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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 69

LILLIAN BOEHM, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 10, 1945.

CERTIORARI GRANTED JUNE 11, 1945.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

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[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 111621

LILLIAN BOEHM, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appearances:

For Taxpayer: Louis Boehm, Esq.
For Comm'r: P. J. Cavanaugh, Esq.

DOCKETT ENTRIES

1942

Jun. 22—Petition received and filed. Taxpayer notified. Fee paid.
Jun. 22—Copy of petition served on General Counsel.
Jun. 22—Request for Circuit hearing in New York filed by taxpayer. 6/22/42 Copy served.
Aug. 10—Answer filed by General Counsel.
Aug. 12—Copy of answer served on taxpayer. (New York City)

1943

Mar. 23—Hearing set June 14, 1943. (New York City)
Jun. 14—Hearing had before Judge Van Fossan on the merits. Submitted.
Stipulation as to the facts filed. Briefs due August 1, 1943.
Reply briefs due August 16, 1943.
[fol. 2] Jun. 26—Transcript of hearing 6/14/43 filed.
Jul. 27—Brief filed by General Counsel. 7/30/43 Copy served
Jul. 30—Brief filed by taxpayer. 7/30/43 Copy served.
Aug. 13—Reply brief filed by General Counsel. Served 8/14/43.
Aug. 14—Reply brief filed by taxpayer. 8/16/43 Copy served.

1943

Oct. 23—Memorandum findings of fact and opinion rendered. Van Fossan, Judge, Div. 9. Decision will be entered under Rule 50. 10/23/43 Copy served.

Nov. 5—Motion for a rehearing to open the record for the presentation and submission of further evidence, filed by taxpayer. 11/8/43 Denied.

Dec. 15—Computation of deficiency filed by General Counsel. Agreed to.

Dec. 18—Decision entered. Van Fossan, Judge, Div. 9.

Dec. 31—Motion to fix amount of bond at $7000.00 filed by taxpayer.

1944

Jan. 8—Motion to fix amount of bond at $9100.00 filed by taxpayer. 1/11/44 granted.

Feb. 16—Bond in the sum of $9100.00 approved and ordered filed. Power attorney and agreement.

Feb. 16—Petition for review by U. S. Circuit Court of Appeals 2nd Circuit, with assignments of error filed by taxpayer.

Feb. 24—Affidavit of service by mail filed.

Feb. 24—Praecipe for record filed by taxpayer.

Feb. 24—Affidavit of service by mail filed.

[fol. 3] UNITED STATES BOARD OF TAX APPEALS

Docket No. 111621

[Same Title]

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Collector of Internal Revenue in his notice of deficiency (Bureau symbols C-TS:NYD COP) dated April 21, 1942, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual with residence at 470 West End Avenue, Borough of Manhattan, City and State of New York. The returns for the periods here involved

were filed with the Collector for the Third District of New York.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A"), was mailed to the petitioner on April 21, 1942.

3. The taxes in controversy are income taxes for the calendar years 1936 and 1937. The deficiency asserted is $7,663.09, all of which is in controversy.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

A. In including as taxable income for the year 1936 the sum of $500 received as dividends from The Lehman Corporation (Exhibit A, page 3).

B. In including as taxable income for the year 1936 the sum of $46, as the alleged value of the right to subscribe [fol. 4] to $200 principal amount of National Dairy Products Corporation debentures at 23 (Exhibit A, page 3).

C. In including as taxable income for the year 1937 the sum of $100 allegedly received as dividends from Fifth Avenue Coach Company (Exhibit A, page 5).

D. In including as taxable income for the year 1937 the sum of $44.32 received as dividends from Fifth Avenue Coach Company (Exhibit A, page 5).

E. In including as taxable income for the year 1937 the sum of $300 allegedly received as dividends from Loew's, Inc. (Exhibit A, page 5).

F. In including as taxable income for the year 1937 the sum of $480 allegedly received as dividends from National Dairy Products Corporation (Exhibit A, page 5).

G. In including as taxable income for the year 1937 the sum of $1,250 received as dividends from The Lehman Corporation (Exhibit A, page 5).

H. In including as taxable income for the year 1937 the sum of $250 received as dividends from American Canadian Properties Corp. (Exhibit A, page 5).

I. In including as taxable income for the year 1937 the sum of $12,500 received upon the sale of stock of The Hartman Corporation (Exhibit A, page 6).

J. In disallowing a deduction for the year 1937 of $19,940 as a loss on stock of The Hartman Corporation (Exhibit A, page 6).

K. In including as taxable income for the year 1937 of the sum of $4,612 received upon the sale of stock of Spear & Company (Exhibit A, page 7).

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

[fol. 5] A

I. Upon information and belief, that The Lehman Corporation was duly organized under the laws of the State of Delaware on or about September 14, 1929.

II. Upon information and belief, that The Lehman Corporation files its income tax returns on a fiscal year basis, ending June 30th in each and every year.

III. Upon information and belief, that the earnings or profits of The Lehman Corporation accumulated after February 28, 1913 were as follows:

Period	Profit or (Loss)
September 24, 1929 to December 31, 1934	($16,264,941.51)
January 1, 1935 to June 30, 1935	1,299,149.39
Sub-total to June 30, 1935	($14,965,792.12)
July 1, 1935 to December 31, 1935	3,295,603.75
Sub-total to December 30, 1935	($11,670,188.37)
January 1, 1936 to June 30, 1936	7,040,933.07
Sub-total to June 30, 1936	($4,629,255.30)
June 30, 1936 to December 31, 1936	5,474,270.55
Sub-total to December 31, 1936	845,015.25
January 1, 1937 to June 30, 1937	7,023,068.77
	$7,868,084.02
July 1, 1937 to December 30, 1937	1,849,050.97
Total December 30, 1937	$9,717,134.99

[fol. 6] IV. Upon information and belief, that at all of the several times when the foregoing operating losses were sustained by The Lehman Corporation, it had a large paid-in surplus (no part of which resulted from transfers of earnings) in excess of said operating losses.

V. That in the year 1936 there was paid to petitioner the sum of $500 as dividends by The Lehman Corporation.

VI. Upon information and belief, that on December 31, 1935, the Lehman Corporation had an accumulated operating deficit of $11,670,188.37; that said Corporation's earnings for the calendar year 1936 totalled $12,315,203.62, leaving a balance over and above the accumulated operating deficit that existed on December 31, 1935 of $845,015.25; that during the calendar year 1936 said Corporation paid dividends aggregating $2,627,695.00, of which only 32% was paid out of income, for which reason only that percentage of the dividends received by petitioner is taxable.

B

I. Upon information and belief, petitioner did not sell or exercise the right to subscribe to debentures of National Dairy Products Corporation.

C

I. That petitioner during the year 1937 received $316 as dividends from Fifth Avenue Coach Company.

II. That petitioner's records show the receipt of only $316 as dividends from Fifth Avenue Coach Company.

[fol. 7] III. That during the year 1937 petitioner was the owner of 158 shares of capital stock of Fifth Avenue Coach Company.

IV. That in response to an inquiry made on behalf of petitioner, said Fifth Avenue Coach Company advised that the dividends paid during the year 1937 amounted to $2 a share.

V. That the amount of $416 allegedly reported by Fifth Avenue Coach Company on form F-1099 as having been paid to petitioner during the year 1937 as dividends, was reported in error.

D

I. That during the year 1937 petitioner exchanged her shares of stock of New York Transportation Company for stock of Fifth Avenue Coach Company.

II. That prior to 1937 all the issued and outstanding stock of Fifth Avenue Coach Company was owned by New York Transportation Company.

III. That during the year 1937 New York Transportation Company was dissolved and the stock of Fifth Avenue Coach Company distributed to its stockholders.

IV. That in connection with said dissolution, petitioner on March 30, 1937 received the sum of $44.32, which was a capital distribution, and not income.

E

I. That petitioner during the year 1937 received $600 as dividends from Loew's, Inc.

[fol. 8] II. That petitioner's records show the receipt of only $600 as dividends from Loew's, Inc.

III. That petitioner endorsed a check for $300, being part of the said $600, to her brokers for deposit in her account.

IV. That said brokers erroneously recorded said deposit as a dividend received by petitioner, resulting in a duplication of $300 of the $600 received by petitioner.

F

I. That petitioner during the year 1937 received $240 as dividends from National Dairy Products Corporation.

II. That petitioner's records show the receipt of only $240 as dividends from National Dairy Products Corporation.

III. That petitioner's brokers erroneously credited certain dividends paid by National Dairy Products Corporation to petitioner instead of to petitioner's husband Louis Boehm, who was entitled to receive the same, and who reported the same as income in his return filed for the year 1937.

G

I. Petitioner repeats the allegations set forth in Paragraph 5, subdivision A, sub-paragraphs I to IV, inclusive, with the same force and effect as though set forth at length hereunder (Pages 3 and 4).

II. In the year 1937 there was paid to petitioner the sum of $1,250 as dividends by The Lehman Corporation.

[fol. 9] III. That during the year 1937 the earnings of The Lehman Corporation totalled $8,872,119.74; the dividends paid by said corporation during said year aggregated $9,790,167.00, of which only 89% was paid out of income, for which reason only that percentage of the dividends received by petitioner is taxable.

H

I. That petitioner during the year 1937 received $250 as dividends from American Canadian Properties Corp.

II. Upon information and belief, said $250 was a capital distribution, not taxable as income.

III. That petitioner was informed by American Canadian Properties Corp. that the said dividend was a capital distribution, the funds for which were derived from the sale of certain properties of the Company.

I

I. Petitioner purchased 1100 shares of Hartman Corporation, Class A stock in 1929 at a cost of $32,440.00.

II. Upon information and belief that said Hartman Corporation was mismanaged by its directors, who wasted and diverted its assets.

III. That in 1932 petitioner and other stockholders of Hartman Corporation commenced an action on behalf of the Hartman Corporation against its former directors, to recover for waste, mismanagement and diversion of its assets.

[fol. 10] IV. That in 1937 the said action was settled as a result of which petitioner sold her stock and received the sum of $12,500.

V. That by reason of the foregoing, petitioner sustained a loss of $19,940 in the year 1937, when the aforesaid cause of action, which constituted a valuable property right of the Hartman Corporation, was settled.

J

I. Petitioner repeats the allegations set forth in Paragraph 5, subdivision I, sub-paragraphs I to V, inclusive, with the same force and effect as though set forth at length hereunder (Page 8).

K

I. Petitioner purchased 190 shares of Spear & Company common stock in 1929 at a cost of $1848.

II. Upon information and belief, that said Spear & Company was mismanaged by its directors, who wasted and diverted its assets.

III. That in 1934 petitioner commenced an action on behalf of Spear & Company against its directors, to recover for waste, mismanagement and diversion of assets.

IV. That in 1937 said action was discontinued when petitioner sold her stock for $6,460.

V. That by reason of the foregoing petitioner sustained a capital gain of $4,612.

[fol. 11] Wherefor, the petitioner prays that this Board may hear the proceeding, and

(a) delete the increase of income for the year 1936 by $500 representing dividends received from The Lehman Corporation;

(b) delete the increase of income for the year 1936 by $46 representing the value of the right to subscribe to National Dairy Products Corporation debentures:

(c) delete the increase of income for the year 1937 by $100 allegedly received as dividends from Fifth Avenue Coach Company:

(d) delete the increase of income for the year 1937 by $44.32 received as dividends from Fifth Avenue Coach Company;

(e) delete the increase of income for the year 1937 by $300 allegedly received as dividends from Loew's, Inc.;

(f) delete the increase of income for the year 1937 by $480 allegedly received as dividends from National Dairy Products Corporation;

(g) delete the increase of income for the year 1937 by $1,250 received as dividends from The Lehman Corporation;

(h) delete the increase of income for the year 1937 by $250 received as dividends from American Canadian Properties Corp.;

(i) delete the increase of income for the year 1937 by $12,500 received upon the sale of stock of The Hartman Corporation;

(j) allow the deduction for the year 1937 of $19,940 as a loss on stock of The Hartman Corporation;

[fol. 12] (k) delete the increase of income for the year 1937 by $4,612 received upon the sale of stock of Spear & Company;

(l) grant to petitioner such other, further and different relief as to this Board may seem just and proper.

Dated, New York, June 19th, 1942.

Lillian Boehm, Petitioner, 60 Broad Street, New York City.

Louis Boehm, Counsel.

(Verified by Lillian Boehm on June 19, 1942.)

[fol. 13] EXHIBIT "A," ANNEXED TO PETITION

Treasury Department

Internal Revenue Service

Office of
Internal Revenue Agent
in Charge
Upper New York Division

Apr 21 1942

Mrs. Lillian Boehm,
470 West End Avenue,
New York, New York.

Madam:

You are advised that the determination of your income tax liability for the taxable years 1936 and 1937 discloses a deficiency of $7,663.09 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Internal Revenue Agent in Charge, 341-9th Ave., New York, N. Y. for the attention of UNY:CONF:EAC. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest [fol. 14] period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully, Guy T. Helvering, Commissioner; by
C. B. Allen, Internal Revenue Agent in Charge.

Enclosures: Statement. Form of waiver.

STATEMENT

Mrs. Lillian Boehm
470 West End Avenue
New York, New York

Tax Liability for the Taxable Years Ended December 31, 1936 and 1937

Income Tax

Year	Liability	Assessed	Deficiency
1936	$ 208.32	$ 82.69	$ 125.63
1937	7,691.14	153.68	7,537.46
Totals	$7,899.46	$236.37	$7,663.09

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated January 31, 1938, November 30, 1939; to your protest dated March 25, 1940; and to the statements made at the conferences held on May 29, 1940, June 14, 1940, September 17, 1941, and October 3rd, 1941.

If you do not acquiesce in all of the adjustments making up the deficiency indicated, but desire to stop the accumulation of interest on that part of the deficiency resulting from adjustments to which you agree, please fill out the enclosed form of waiver, inserting therein the [fol. 15] amount of the deficiency you desire to have assessed at once. The execution of the form for the agreed portion of the deficiency will not deprive you of your right to petition the United States Board of Tax Appeals for a redetermination of the deficiency.

Taxable Year Ended December 31, 1936

Adjustments to Net Income

Net income as disclosed by return		$2,449.63
Unallowable deductions and additional income:		
(a) Interest	$1,990.00	
(b) Interest (tax-free covenant bonds)	600.00	
(c) Dividends	746.00	3,336.00
Total		$5,785.63

Non-taxable income and additional deductions:	
(d) Capital gain	812.99
Net income adjusted	$4,972.64

Explanation of Adjustments

(a) Interest received on securities	$7,984.63
Interest reported on securities	5,994.63
Increase	$1,990.00
(b) Interest received (tax-free covenant bonds)	$875.00
Interest reported (tax free covenant bonds)	275.00
Increase	$600.00

[fol. 16] The above adjustments, which are not in dispute have been explained in detail in statements previously furnished you.

(c) The taxable income from dividends reported in your 1936 return was understated by the sum of $746.00 received from the following named corporations:

Lehman Corporation	$500.00
National Dairy Products Corporation	46.00
Safeway Stores, Inc.	200.00
Total	$746.00

(d) Capital gains:	
As reported	$1,269.95
As corrected	456.96
Decrease	$812.99

This adjustment, which is not in dispute, has been explained in detail in statements previously furnished you.

Computation of Tax

Net income adjusted	$4,972.64
Less:	
Personal exemption	None
Credit for dependents	None
Balance (surtax net income)	$4,972.64

Less:	
Earned income credit (10% of $3,000.00)	300.00
Net income subject to normal tax	$4,672.64

[fol. 17]

Normal tax at 4% on $4,672.64	$186.91
Surtax on $4,972.64	38.91
Total tax	$225.82
Less:	
Income tax paid at source	17.50
Correct income tax liability	$208.32
Income tax assessed:	
Original, Account No. 828189	82.69
Deficiency of income tax	$125.63

Taxable Year Ended December 31, 1937

Adjustments to Net Income

Net income as disclosed by return		$7,822.41
Unallowable deductions and additional income:		
(a) Dividends	$2,035.91	
(b) Worthless stock	19,940.00	
(c) Settlement of suit	12,500.00	
(d) Settlement of suit	4,612.00	
(e) Interest	26.61	39,114.52
Net income adjusted		$46,936.93

Explanation of Adjustments

(a) The taxable income from dividends reported in your 1937 return was understated by the sum of $2,035.91, determined as follows:

Taxable dividends received in 1937	$19,821.19
Taxable dividends reported in your 1937 return	17,785.28
Understatement	$2,035.91

[fol. 18] (b) The amount of $19,940.00 claimed in your 1937 return as a loss on worthless stock of the Hartman Corporation does not represent an allowable deduction from gross income for that year under the provisions of Section 23 of the Revenue Act of 1936.

(c) It is held that the amount of $12,500, received by you in 1937 as the result of the settlement of an action brought against former directors of the Hartman Corporation, represents taxable income for that year which was not reported as such in your 1937 return.

(d) It is held that the amount of $4,612.00, received by you in 1937 as a result of the settlement of an action brought against the directors of Spear & Company represents ordinary income rather than capital gain as reported in your 1937 return.

(e)

Interest received—per return—lines 3 and 4	$8,084.74
Interest received—corrected	8,111.35
Increase	$26.61

This adjustment, which is not in dispute, has been explained in detail in statements previously furnished you.

Computation of Tax

Net income adjusted		$46,936.93
Less:		
Personal exemption	$2,500.00	
Credit for dependents	800.00	3,300.00
Balance (surtax net income)		$43,636.93
[fol. 19] Less:		
Earned income credit (10% of $3,000.00)		300.00
Net income subject to normal tax		$43,336.93
Normal tax at 4% on $43,336.93		$1,733.48
Surtax on $43,636.93		5,992.86
Total Tax		$7,726.34

Less:	
Income tax paid at source	35.20
Correct income tax liability	$7,691.14
Income tax assessed:	
Original, Account #265,001	153.68
Deficiency of income tax	$7,537.46

[fol. 20] UNITED STATES BOARD OF TAX APPEALS

Docket No. 111621

[Same Title]

ANSWER

Comes now the respondent, by his attorney, J. P. Wenchel, Chief Counsel for the Bureau of Internal Revenue, and for answer to the petition heretofore filed in this proceeding, admits and denies as follows:

1. Admits the allegations in paragraph 1 of the petition.

2. Admits the allegations in paragraph 2 of the petition.

3. Admits the allegations in paragraph 3 of the petition.

4. Denies that respondent erred in any respect as alleged in paragraphs 4, A to K, inclusive.

5. A. I to IV, inclusive. Denies the allegations in paragraphs 5. A. I to IV, inclusive.

5. A. V. Admits the allegations in paragraph 5. A. V.

5. A. VI. Denies the allegations in paragraph 5. A. VI.

5. B. I. Denies as immaterial the allegations in paragraph 5. B. I. of the petition.

5. C. I to V., inclusive. For lack of sufficient information, cannot admit and therefore denies the allegations in the [fol. 21] correspondingly numbered and designated paragraphs of the petition.

5. D. I to IV, inclusive. Denies the allegations in the correspondingly numbered and designated paragraphs of the petition.

5. E. I to IV, inclusive. For lack of sufficient information cannot admit and therefore denies the corespondingly numbered and designated paragraphs of the petition.

5. F. I to III, inclusive. Denies all and singularly the allegations in the correspondingly numbered and designated paragraphs of the petition.

5. G. I to III, inclusive. Denies all and singularly the allegations in the correspondingly numbered and designated paragraphs of the petition.

5. H. I to III, inclusive. Denies all and singularly the allegations in the correspondingly numbered and designated paragraphs of the petition.

5. I. I to V, inclusive. Denies all and singularly the allegations in the correspondingly numbered and designated paragraphs of the petition.

5. J. I. Denies all and singularly the allegations in the correspondingly numbered and designated paragraph of the petition.

5. K. I to V, inclusive. Denies all and singularly the allegations in the correspondingly numbered and designated paragraphs of the petition.

[fol. 22] 6. Denies generally and specifically each and every material allegation in the petition not herein admitted, qualified, or denied.

WHEREFORE, it is prayed that the determination of the Commissioner be approved and that the relief prayed for by petitioner be denied.

(Signed) J. P. Wenchel, RPH, Chief Counsel, Bureau of Internal Revenue.

Of Counsel: E. C. Algire, Division Counsel; J. R. Johnston, Special Attorney, Bureau of Internal Revenue.

[fol. 23] THE TAX COURT OF THE UNITED STATES

Docket No. 111621

[Same Title]

MOTION FOR A REHEARING TO OPEN THE RECORD FOR THE PRESENTATION AND SUBMISSION OF FURTHER EVIDENCE

Comes now the petitioner by her attorney, Louis Boehm, and respectfully shows to the Court:

This case was on the calendar of this Court on June 14, 1943, at which time it was submitted upon a stipulation of facts. At the time of the preparation and submission of the stipulation of facts, counsel for both parties intended to include all the facts necessary for a determination of the issues in the case.

On October 23, 1943, this Court in an opinion by Judge Van Fossan decided that the stipulation did not contain sufficient facts to enable it to decide the issues on the merits. As appears from the opinion of this Court, there were two issues in this case:

The first issue presented "the question of when the petitioner's stock in Hartman (Virginia) became worthless" (opinion, p. 7). Petitioner contended that "the identifiable event which determined the fact and the extent of her loss due to the worthlessness of the stock was the negotiated settlement of the Graham suit in 1937 * * *" (Opinion, p. 8). This Court in its opinion said: "We have no evidence on which to base a conclusion that the Graham suit was an asset of any substantial value. We know nothing of the merits of the suit, the probability of recovery, the assurance of the collection of a judgment, or other essential factors. The stipulated fact that the defendants were men of financial responsibility is not [fol. 24] sufficient to establish the collectibility of a recovery equal to the outstanding claims. These claims aggregated more than half a million dollars and had to be satisfied before there would be anything for the stockholders."

The stipulation of facts included a copy of the complaint in the Graham suit as Exhibit 6-F. When we prepared the stipulation we were of the opinion that the facts

set forth in the complaint, plus the fact that the defendants had paid out $50,000 in settlement of their liability, sufficiently disclosed the fact that the action was a meritorious one, and that there was a probability of recovery against the directors. Apparently we were mistaken in that opinion. The omission was entirely inadvertent, and can readily be supplied. This motion is made for the purpose of enabling the petitioner to supply this evidence, either by a further stipulation of facts, or by the testimony of witnesses familiar with the Graham case, who will testify as to the facts upon which the suit was based, the merits of the suit, the probability of recovery therein, and the collectibility of a judgment against the directors. Paragraph "15" of the complaint in the Graham suit alleged that in the years 1929 and 1930 the directors purchased 64,879 shares of Hartman Corporation Class B stock in the open market at a cost of $1,422,000. It is further alleged in Paragraph "18" of the complaint that part of the stock so purchased by the Corporation was stock owned by the directors, and that they personally benefitted thereby. The entire amount of $1,422,000 paid for this stock became a total loss to the Hartman Corporation. Quite apart from the other allegations of damage set forth in the complaint, this claim alone of $1,422,000 is more than twice the amount of the outstanding claims of $707,-[fol. 25] 000, mentioned at page 8 of the opinion of this Court. Evidence will be offered on the rehearing to show that the recovery on the causes of action set forth in the complaint would far exceed the amount of outstanding claims of creditors, and would leave a substantial amount for the stockholders. Evidence will also be offered that the defendant directors in the Graham suit were able to respond to any judgment that might be rendered against them, and that their net worth was many millions of dollars.

The second issue in this case is whether "the payment of $12,500 was income to petitioner" (Opinion, p. 8). This amount was received by petitioner as her share of the settlement in the Graham suit. This Court in its opinion at page 9 stated: "How the sum was arrived at we do not know. Apparently it was a negotiated lump-sum settlement. Whether the defendants merely 'bought their peace' we can only conjecture." This motion is made to enable

petitioner to offer proof that the directors did not merely "buy their peace," but that it was the result of an approximate admeasurement of the damage which was suffered by the plaintiff stockholders in the Graham suit, as a result of the mismanagement of the corporation by the directors, which resulted in its insolvency. This proof will be supplied by witnesses who engaged in the negotiations which led to the settlement, and who will testify as to how the amount was arrived at, and that the settlement was not based on the nuisance value of the suit, but that it was intended to compensate the stockholders for their proportionate loss occasioned by the wrongful acts of the directors.

Unless this further evidence is supplied on a rehearing, the decision in this case will not be upon the merits. The stipulation of facts was prepared for the convenience of the Court, and to eliminate the necessity of deciding [fol. 26] factual issues concerning which there was no dispute. In endeavoring to expedite the administration of justice in this controversy, the parties inadvertently failed to supply evidence which this Court upon a careful study of the case deemed to be necessary to a proper determination of the issues on the merits. Petitioner should not be prejudiced by this inadvertent omission. Petitioner and her counsel believe that the further evidence will result in a decision of both issues on the merits, instead of a decision based upon the inadvertent omission of necessary facts in the stipulation. For that reason, the granting of the within motion will be in the interest of substantial justice.

Premises considered, petitioner moves and prays:

That the motion for a rehearing be granted, and that petitioner be afforded an opportunity on rehearing to produce evidence as to the merits of the Graham suit, the probability of recovery therein, the collectibility of a judgment rendered therein, and that the settlement of the Graham suit was intended to compensate the petitioner for the damage suffered by her by reason of the acts complained of in the Graham suit.

Louis Boehm, Counsel for Petitioner, 60 Broad Street, New York, N. Y.

[fol. 27] THE TAX COURT OF THE UNITED STATES

[Same Title]

STIPULATION OF FACTS

It is hereby stipulated and agreed, by and between the parties hereto, by their respective counsel, that the following facts shall be taken as true and correct; provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated.

1. Petitioner is a married individual residing in New York, New York. Her separate income tax return for the year 1937 was filed with the Collector of Internal Revenue for the Third District of New York.

2. In 1929 the petitioner purchased 1,100 shares of the Class "A" stock of The Hartman Corporation at a cost of $32,440.00. The Hartman Corporation was incorporated in 1916 in the State of Virginia to acquire the capital stock of the Hartman Furniture and Carpet Company, an Illinois corporation, and its affiliates, engaged in the business of selling furniture, carpets and household goods.

3. In June 1932 Martin L. Straus and Elias Mayer were appointed equity receivers for The Hartman Corporation in the District Court of the United States for the Northern District of Illinois, Eastern Division. The said receivers entered into possession of the company's property and continued its business of buying and selling furniture and other household articles from the time of their appointment until on or about May 26, 1933. Copies of the bill of complaint in such action and the order appointing [fol. 28] the receivers are attached hereto and made a part hereof as Exhibits 1-A and 2-B.

4. Petitioner received a letter from The Hartman Corporation dated April 4, 1932 with balance sheet of December 31, 1931, copy of which is attached as Exhibit 3-C and made a part hereof, and on May 4, 1932 received a letter from the same company, copy of which is attached as Exhibit 4-D and made a part hereof.

5. In 1933 a new corporation called Hartman's, Inc., was organized under the laws of the State of Delaware.

As of May 26, 1933 Hartman's, Inc., purchased at a bankruptcy sale the assets of Hartman Furniture and Carpet Company (Illinois) the wholly-owned subsidiary of The Hartman Corporation for the sum of $501,000.00 in cash and an agreement to procure a waiver of certain intercompany claims against the bankrupt estate. The stock of the new company was issued to the creditors of Hartman Furniture and Carpet Company (Illinois) in settlement of claims, and to the stockholders of The Hartman Corporation by subscription thereto. The stockholders of The Hartman Corporation were given the right to subscribe for debentures and capital stock of Hartman's, Inc., as set forth in letter dated June 7, 1933, attached hereto as Exhibit 5-E and made a part hereof.

6. The petitioner did not exercise the right of subscribing to the debentures and stock of Hartman's, Inc., and did not acquire any interest in that company in 1933 or thereafter.

7. The receivers of the Hartman Corporation filed a report with the Court on August 10, 1934. The assets on that date were there said to consist of $39,593.13 in cash [fol. 29] and a suit pending against the directors of The Hartman Corporation in New York, being the same suit hereinafter referred to in paragraph 10 hereof. There were total claims outstanding of $707,430.67. The receivers recommended that claims totaling $630,574.57 be allowed. The Court approved this report by an order dated August 10, 1934. It also awarded $3,500.00 as compensation to each of the receivers and $5,000.00 as attorneys' fees. The receivers filed a second report on July 11, 1935. Assets were cash in the amount of $27,192.51 and the pending suit against the directors. Liabilities remained the same. The receivers recommended that a dividend of four per cent be paid on the claims totaling $630,574.57 and that one of $176,856.10 be disallowed by order of the Court. The Court, by order dated June 11, 1934, adopted the report and its recommendations. One of the two receivors was released from further duties on August 26, 1935. The suit against the directors was dismissed on May 14, 1937 according to stipulation filed.

8. The remaining receiver filed a final report with the Court on September 30, 1937. The sole remaining asset

was cash in the amount of $1,909.94. Claims totaled $630,574.57. It was recommended that compensation totaling $900.00 be allowed the receiver and counsel and the remainder be distributed to the creditors. The Court adopted the recommendations and discharged the receiver by an order dated September 30, 1937.

9. Petitioner in her Federal income tax return for the year 1934 claimed a deduction from gross income in the amount of $32,302.00 as a loss due to the worthlessness of the 1,100 shares of the Class "A" stock of The Hartman Corporation owned by her. Said deduction was denied by the respondent on the ground that said stock did not become worthless in the year 1934.

[fol. 30] 10. On December 16, 1932 petitioner with other stockholders of The Hartman Corporation commenced an action in the Supreme Court of the State of New York, County of New York, in behalf of The Hartman Corporation, against its former officers and directors. Copies of the summons and complaint in such action are attached hereto as Exhibit 6-F. That thereafter during the years 1933 to 1936, inclusive, and in connection with the prosecution of said action, petitioner's counsel went to Chicago, Illinois, and spent four days there on the examination of certain of the defendants who resided in that City. That examinations of certain of the defendants were also held from time to time in the City of New York. That in the course of such examinations many hundreds of pages of testimony were taken and numerous exhibits were offered in evidence. Petitioner and other plaintiff stockholders were ordered by the New York Supreme Court to pay the counsel fees and transportation and hotel expenses of the defendants' New York counsel who traveled to Chicago and represented said defendants on such examination. Such counsel fees and expenses amounted to approximately $800.00. That petitioner and the other plaintiff stockholders also paid the transportation and hotel expenses of their own counsel in attending upon such examinations and also paid the fees of the stenographer who took down in shorthand and transcribed the testimony of such defendants and also paid the fees of the commissioner before whom the examinations were held. Petitioner and other plaintiff stockholders also paid for the cost of print-

ing the briefs in the Appellate Division of the New York Supreme Court on an appeal which defendants had taken to such Court. That the amount of disbursements incurred and paid by petitioner and the other plaintiff stockholders, exclusive of the fees of their own counsel, amounted to ap- [fol. 31] proximately $2,000.00. That at the conclusion of such examinations and shortly before the trial, negotiations were commenced for a settlement of the action. That on February 20, 1937 said negotiations were consummated in a settlement as a result of which the defendant directors paid to petitioner and the other plaintiff stockholders the sum of $50,000.00 in full settlement and discharge of the claims and cause of action of petitioner and the other plaintiff stockholders as set forth in the complaint in the action above referred to. That petitioner and the other stockholders in connection with the aforesaid settlement released all their rights and claims arising out of the acts committed by the defendants as set forth in their complaint. That other than the cause of action set forth in said complaint The Hartman Corporation at the time of the settlement had no other assets except the sum of $1,909.94 in cash, as above set forth, against which claims of creditors had been allowed by the Court in the sum of $630,574.57. Out of the sum of $50,000.00 paid to petitioner and the other stockholders, petitioner received as her proportionate share of the recovery, after the payment of counsel fees and expenses, the sum of $12,- 500.00. That the defendant directors were persons of financial responsibility, some of them being members of the banking firm of Hallgarten and Company, investment bankers of New York and Chicago, one of them being president and director of the May Department Stores, and one being president, director, and principal stockholder of The Advance Corporation which owned a majority of the stock of the Eversharp Pencil Company.

11. Petitioner in her Federal income tax return for the year 1937 claimed a deduction from gross income in the amount of $19,940.00 as a loss due to the worthlessness of the stock of The Hartman Corporation. In the deficiency notice the respondent denied the deduction of $19,- [fol. 32] 940.00 and included the amount of $12,500.00 received upon the settlement in the petitioner's gross income for the year 1937.

12. Petitioner at no time received any deduction from her gross income in the determination of her income tax liability by reason of her investment in said stock.

IT IS FURTHER STIPULATED that the following issues presented in this proceeding shall be disposed of as follows:

13. Respondent concedes that the amount of dividends received in the year 1936 from the Lehman Corporation, as shown in the deficiency notice, is overstated by the amount of $150.00. Petitioner abandons the assignment of error, paragraph 4A of the petition, as to the remainder thereof.

14. Respondent admits error in including as taxable income for the year 1936 the sum of $46.00, paragraph 4B of the petition; and in including as taxable income for the year 1937 the sums of $300.00, paragraph 4-E; $480.00, paragraph 4F; $250.00, paragraph 4H; and $4,612.00, paragraph 4K of the petition, such amount being correctly reported as capital gain in the petitioner's return.

15. Petitioner abandons the assignment of errors set forth in paragraphs 4C, 4D, and 4G of the petition.

Louis Boehm, Counsel for Petitioner; J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue.

[fol. 33] EXHIBIT 1-A, ANNEXED TO FOREGOING STIPULATION OF FACTS

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

In Equity No. 11961

MILON STONE, Plaintiff,

vs.

THE HARTMAN CORPORATION, a Corporation, Defendant

To the Honorable Judges of the District Court of the United States for the Northern District of Illinois, Eastern Division, in Equity Sitting:

The plaintiff herein, Milon Stone, brings this bill of complaint against the defendant, the Hartman Corporation, a

corporation, on his own behalf and on behalf of all other creditors of the defendant who may join in the prosecution of this suit, and alleges as follows:

1. The plaintiff, Milon Stone, is a resident and citizen of the City of Chicago, State of Illinois, and Northern District of Illinois.

2. The defendant, The Hartman Corporation, is a corporation organized and existing under the laws of the State of Virginia, and is a citizen and resident of said state, with [fol. 34] an office in the City of Richmond, in said State of Virginia, and has and maintains an office for the transaction of business and transacts and does business in the City of Chicago, County of Cook, in the State of Illinois, at which office in said City of Chicago its principal books and records are kept, and its principal and executive officers have their offices, and the business of said defendant is principally transacted and all its property and assets are located in said City of Chicago, in the State of Illinois, and in the Eastern Division of the Northern District of Illinois.

3. This is a suit of a civil nature in equity, and the matters in dispute and controversy herein, exclusive of interest and costs, exceed the sum of $3,000.00.

4. The plaintiff is informed and believes, and on such information and belief so states the fact to be, that the defendant was incorporated on, to-wit, the 21st day of January, 1916, and that its outstanding capital stock at the present time consists of 59,072 shares of Class "A" stock and 335,121 shares of Class "B" stock. The shares of Class "A" stock are entitled to cumulative dividends at the rate of $2.00 per share per annum, and no more, payable in preference to dividends under Class "B" stock, and redeemable at $30.00 per share and accrued dividends. Upon the dissolution of the corporation the Class "A" stock is entitled to share equally and ratably with Class "B" shares in the distribution of the assets until the holder of each share of Class "A" stock shall have received $30.00 per share plus accrued dividends. The shares of Class "B" stock have a stated value of $10.00 a share, and are entitled to dividends only after cumulative dividends at the rate of $2.00 per share per annum have been paid on Class "A" [fol. 35] stock, and said Class "B" stock is entitled to share equally with Class "A" stock in the distribution of the

assets of the corporation until Class "A" stock shall have received $30.00 per share and accrued dividends, and thereafter all assets of said corporation are to be distributed ratably among the holders of Class "B" stock without participation with the holders of Class "A" stock.

5. The defendant is engaged through subsidiary companies in conducting stores and places of business for the sale of furniture, carpets, rugs, draperies and other kinds of goods, wares and merchandise in the City of Chicago and other cities in Cook County and other places in the State of Illinois and in various towns and cities in the States of Wisconsin, Indiana and Nebraska, respectively, and said defendant company owns the entire capital stock of said subsidiary companies (except a few qualifying shares in each of said companies), and as such owner of substantially all of the capital stocks of said respective subsidiary companies the defendant company has been obliged from time to time to make provision for the necessary financing of said subs diary companies to enable said subsidiary companies to continue their business, and thereby the defendant compa iy has incurred large financial obligations as a guarantor of notes and other evidences of indebtedness of said subsidiary companies.

6. The plaintiff is informed and believes, and on such information and belief alleges that the said defendant, The Hartman Corporation, now owns and holds (except for qualifying directors shares) all of the capital stock of the following subsidiary corporations:

(a) Hartman Furniture & Carpet Company, an Illinois corporation, with an authorized and outstanding capital [fol. 36] stock of $60,000 operating and conducting stores and places of business in Chicago and other cities in Cook County and in other places in the State of Illinois, and in various towns and cities in the States of Indiana, Wisconsin, and Nebraska, respectively. Said company has assets, exclusive of good will, of approximately $9,500,000 and liabilities of approximately $4,600,000. Said company is the principal operating subsidiary corporation of the defendant corporation.

(b) Hartman's Inc. (formerly known as Hartman Furniture & Carpet Company of Wisconsin), a corporation organized under the laws of the State of Wisconsin, with

an authorized and outstanding capital stock of $50,000; operating and conducting two stores in the City of Milwaukee, and one store at West Allis, a suburb of Milwaukee, in the State of Wisconsin. Said company has assets (including accounts due from the Hartman Furniture & Carpet Company, of Illinois, of $372,907.88) amounting to the sum of $1,086,000, and liabilities in the sum of $55,000.

(c) Hartman Furniture & Carpet Company of Minnesota, a corporation organized under the laws of the State of Minnesota, with an authorized and outstanding capital stock of $30,000, and has assets amounting approximately to the sum of $2500, and has liabilities approximately in the sum of $12,000.

(d) Hartman Furniture & Carpet Company of Nebraska organized under the laws of the State of Nebraska, with an authorized and outstanding capital stock of $60,000. Plaintiff states and alleges on information and belief that the business of this corporation was closed in December, 1931, and that its accounts receivable are pledged to an organization known as the Commercial Investment Trust.

[fol. 37] (e) Illinois Furniture Company (formerly Hartman Furniture & Carpet Company) of Missouri, organized under the laws of the State of Missouri, with an authorized and outstanding capital stock of $10,000. Plaintiff is informed and believes that this company has title to a number of accounts receivable, all of which accounts receivable have been and are pledged with C. I. T. Corporation, a corporation organized and existing under the laws of the State of Maryland.

(f) Hartman Realty Trust, a trust organized under the Massachusetts plan, which holds title to certain warehouse property in the City of Chicago, Illinois. Plaintiff is informed and believes and on said information and belief alleges that this trust issued and caused to be sold $1,250,000 par value of first mortgage 5½% sinking fund gold bonds, of which there are outstanding at the present time $1,009,900. Plaintiff is informed and believes that said property is leased to the Hartman Furniture & Carpet Company, of Illinois, at a rental sufficient to pay all the carrying charges and protect the sinking fund required, and that said lease is pledged as additional security for the payment of said bonds. Plaintiff is further informed and

believes that default has been made in the payment of said sinking fund gold bonds in the sum of approximately $22,000, which was due on the 15th day of February, 1932, and that an additional payment in like amount will fall due on the 15th day of August, 1932.

(g) The 7th and Mitchell Realty Corporation organized under the laws of the State of Wisconsin, with an authorized and outstanding capital stock of 500 shares of no par value, of the declared value of $500.00. Plaintiff is informed and believes and so alleges that said 7th & Mitchell Realty Corporation holds a long term lease on property at 7th and Mitchell Streets, in the City of Milwaukee, State of Wis- [fol. 38] consin, and has an outstanding 6% mortgage bond issue on said lease for the sum of $185,000, of which $177,000 remains outstanding at the present time. Plaintiff is further informed and believes that performance of the terms and conditions of said ground lease by said corporation and the payment of the bonds and interest thereon are unconditionally guaranteed by the defendant company, The Hartman Corporation.

7. Plaintiff is informed and believes, and on such information and belief alleges the fact to be, that on account of the great general business depression that now and for some time last past has prevailed throughout the United States, said defendant company, as the parent company of said subsidiary corporations, and the owner of all of the capital stocks of said subsidiary companies (except certain qualifying shares of directors) has suffered great financial losses through the operation of said stores and places of business and business enterprises of said subsidiary companies, and that the sales of merchandise by said subsidiary corporations so operating and conducting stores and places of business in various locations, as aforesaid, have greatly decreased and are still decreasing, and that unprecedented credit losses have been incurred due to wide-spread unemployment, and that inventory values have greatly declined with the decrease in commodity prices, and that by reason of the general business depression said defendant has been obliged to and has given up and closed a number of stores which have been operated and conducted in various localities by certain of said subsidiary corporations, and that the losses and expenses incurred and sustained by the defendant in closing said stores during the year 1931

amounted to the sum of $761,648.01. The plaintiff is informed and believes, and on such information and belief [fol. 39] alleges that the defendant company, and its said subsidiary companies, during the year 1930, sustained a net loss from the operation of its said stores and places of business in the sum of $1,830,000, and that during the year 1931 the net losses from the operation of said stores and places of business (exclusive of depreciation and amortization on assets written down) amounted to the sum of $2,076,266.39, and that losses resulting from necessary liquidation during the year 1931 amounted to the further sum of approximately $1,150,000, and that since the first of January, 1932, the losses sustained by said defendant and its subsidiaries have amounted to approximately the sum of $400,000, with additional liquidation losses, the exact amount of which is at this time unknown; and the plaintiff is informed and believes, and on such information and belief so states the fact to be, that the business of the defendant and the business of each of said subsidiary corporations, so owned by the defendant, as aforesaid, is being operated at a great financial loss at the present time.

Plaintiff is informed and believes, and on such information and belief alleges that owing to the business depression and the marked decrease in the sales of merchandise and consequent financial loss to the said defendant, the defendant has been obliged to and has closed and discontinued a number of stores, although required to provide for the continued payment of rentals on leases held by its subsidiary companies operating and conducting said stores so closed and discontinued, and in some instances has suffered financial loss by reason of said subsidiary companies being obliged to pay substantial sums of money to obtain releases from further obligation to pay rentals under leases on said closed and discontinued stores.

[fol. 40] 8. Plaintiff is informed and believes, and on such information and belief so states the fact to be, that because of said general business depression the defendant has been and is hindered and delayed in the collection of the claims and indebtedness due to it and to its subsidiaries, and because of the unusual and extreme stringency in the money market the defendant is unable to borrow sufficient funds with which to carry on its business and the business of its subsidiaries and to meet and pay its obligations due and to become due.

9. The defendant is indebted to the plaintiff (after allowing to the defendant all its credits, deductions and set-offs) in the sum of $5,000, which said sum of $5,000 was due and owing to the firm of Haskins & Sells, accountants, for accounting services rendered by the said Haskins & Sells to and on behalf of the said defendant at the defendant's instance and request; that the plaintiff herein is a partner of the co-partnership of Haskins & Sells, accountants, having offices in Chicago, Illinois, and various other cities, and whose partners reside in Chicago, Illinois, and various other cities, not in the State of Virginia that the various partners of said Haskins & Sells have heretofore released and assigned their respective interest in and to the claim of $5,000 against the defendant herein to the plaintiff herein, and the plaintiff has been credited by said firm of Haskins & Sells (as a co-partner therein) with the said sum of $5,000, and the said sum of $5,000 now being due and owing from the said defendant to the plaintiff the said defendant promises immediately to pay to the plaintiff in cash the said sum of $5,000, and payment of said sum has been duly demanded by the plaintiff from the defendant, but the defendant has failed and refused to pay the said sum of $5,000; or any part thereof, and now claims that [fol. 41] it is unable to pay the same at the present time by reason of its financial condition.

10. The plaintiff is informed and believes, and on such information and belief states the fact to be, that the defendant had become and is indebted to a number of creditors and has become and is liable as a guarantor on divers obligations of its said subsidiary companies, which obligations said subsidiary companies are at present unable to meet and pay.

Plaintiff is informed and believes, and on such information and belief so states the fact to be, that during the year last past one of the subsidiary companies of the defendant, to-wit, the Hartman Furniture & Carpet Company, an Illinois corporation, has been largely financed by certain banking and financial houses under a collateral deposit agreement and letter agreement, both dated as of June 30, 1931, between the defendant, The Hartman Corporation, as party of the first part, Hartman Furniture & Carpet Company, as party of the second part, and C. I. T. Corporation, a corporation organized

and existing under the laws of the State of Maryland, and certain other bank corporations, as parties of the third part; that under said collateral deposit agreement and letter agreement the defendant corporation became and is liable as a guarantor for the payment of all notes executed by the Hartman Furniture & Carpet Company, and given to the said banking corporations, for money loaned by said banking corporations to said Hartman Furniture & Carpet Company; and the plaintiff is informed and believes, and on such information and belief so states the fact to be, that the said Hartman Furniture & Carpet Company borrowed large sums of money under said collateral deposit agreement and letter agreement and delivered its notes therefor to said banking corpora-
[fol. 42] tions, and plaintiff is informed and believes, and on such information and belief so states the fact to be, that there is now due and unpaid on notes issued and delivered to said banking corporations under said collateral deposit agreement and letter agreement the total sum of $2,600,000 and that by reason of certain defaults in the terms and provisions of said collateral deposit agreement, said notes may and will be declared due and payable under the terms and provisions of said collateral deposit agreement, whereby the defendant company will become liable for the payment of said $2,600,000 as a guarantor of said notes under said collateral deposit agreement.

The plaintiff is informed and believes, and on such information and belief alleges that the defendant, as the parent corporation, in order to finance Hartman's Inc., of the City of Milwaukee, Wisconsin, and its other subsidiaries, has caused said subsidiary companies to turn over and deliver to the Hartman Furniture & Carpet Company, the Illinois corporation, substantially all of their bills receivable, which bills receivable have been pledged under the aforesaid collateral deposit agreement, the performance of which is guaranteed by the defendant company.

The plaintiff is further informed and believes, and on such information and belief alleges the fact to be, that the performance of the terms and conditions of the ground lease held by the 7th & Mitchell Realty Corporation, on property at 7th & Mitchell Streets, in the City of Milwaukee, Wisconsin, as aforesaid, and also the payment of the 6% mortgage bonds now outstanding in the sum of

$177,000, issued by said realty corporation, are unconditionally guaranteed by said defendant, and that the defendant is therefore liable upon said lease and also liable for the payment of said bonds as a guarantor.

[fol. 43] The plaintiff is further informed and believes, and on such information and belief alleges, that the said defendant company has also guaranteed the performance of the terms and conditions of certain leases of subsidiary companies, to-wit: A certain lease to the Hartman Furniture & Carpet Company, of Illinois, upon the main store at the City of Milwaukee, Wisconsin, operated by Hartman, Inc., the Wisconsin subsidiary corporation, which lease runs for a term ending April 30, 1953, and certain other lease obligations of other subsidiaries, and so far as the plaintiff is informed at the present time, the defendant is also a guarantor of the payment of the bond issue of said Hartman Realty Trust, of which there are outstanding at the present time 5-½ per cent sinking fund gold bonds in the amount of $1,009,900.

11. Plaintiff further alleges on information and belief, that the defendant company, as the owner and holder of all of the capital stocks of the aforesaid subsidiary companies (except qualifying shares of directors) has been at all times actively engaged in controlling and directing the management and business of said subsidiary companies and each of them to the extent that said subsidiary companies are in effect operated as departments of defendant's business; and that creditors of defendant on obligations of the defendant now due or about to become due, and creditors of defendant's subsidiary companies, are pressing their claims for payment, and plaintiff apprehends that they will forthwith bring suits on past due debts, thereby precipitating a race of diligence and a multiplicity of suits, actions, attachments, judgments, executions, levies and seizures by sheriffs, marshals and other like officers, resulting in the disruption of the business of the defendant and the dissipation of its assets and resources [fol. 44] to the great financial loss and damage and irreparable injury of the defendant and its creditors, including the plaintiff; and the plaintiff alleges that any attempt by the plaintiff to enforce at law his claim as a general creditor against defendant would precipitate similar action on the part of other creditors and lead to wasteful

strife and controversy, and that such strife and controversy can be avoided and the property of the defendant preserved for equitable distribution among those entitled thereto only through the intervention of this honorable court as hereinafter prayed.

12. The plaintiff, on information and belief, further alleges that the assets of the defendant and the properties and assets of its subsidiaries are of great value and represent a large investment, which can not quickly be liquidated or sold without great loss to the defendant and its creditors and the creditors of said subsidiary companies, and the plaintiff believes that the assets of the defendant can be properly preserved for equitable distribution among those entitled thereto only by the intervention of a court of equity and the granting of equitable relief, including the appointment of a receiver or receivers, and that said assets upon thus being administered in a court of equity, through said receivership, will be sufficient to pay in full all liabilities against said defendant, and that a surplus will be left for the benefit of defendant's stockholders.

WHEREFORE as plaintiff has no adequate remedy at law and can have relief only in a court of equity, the plaintiff files this bill of complaint on behalf of himself and of all other creditors of the defendant who may choose to join therein and take the benefit hereof, and pray for equitable relief as follows:

(1) That this Honorable Court administer all and singular the property, rights and assets of defendant and [fol. 45] adjudicate, enforce and adjust all rights, liens, equities and claims of all creditors of defendant therein, including plaintiff, as the same may be determined.

(2) That in order to preserve and protect the properties and assets of defendant and in order that the same may be held together, operated, and ultimately sold or otherwise disposed of as a going entirety, this Honorable Court forthwith appoint a receiver or receivers of all and singular the property and assets of every nature, wheresoever located, held, owned or controlled by defendant, with full power and authority to take into his or their possession and to hold such property and assets and to con-

tinue, manage and operate as a whole the business now being conducted by the defendant, and with all incidental powers ordinarily vested in a receiver or receivers in like cases and with such other powers as this Honorable Court may from time to time grant.

(3) That said receiver or receivers be authorized and empowered to bring suit for, collect and receive and take into his or their possession all the property and assets, real, personal or mixed, goods, chattels, credits, rights, claims and equities, books, papers, securities, cash and other property of defendant whatsover and wheresoever situated; and to institute, prosecute, become party to, intervene in, compromise or defend suits and actions at law or in equity or otherwise, either for the recovery or protection or maintenance of any of the property and assets of defendant or otherwise, as he or they may deem necessary or proper, including such ancillary proceedings in any court or courts of the United States or of any state or of any foreign nation as he or they may deem advisable, and including also any other suits, actions or proceedings in which defendant may have any interest as plaintiff, defendant or otherwise, with the power to continue any [fol. 46] such pending suits, and to defend or otherwise dispose of any such proceedings, suits or actions; to settle, compound and make allowances on any or all debts now due and owing or which may hereafter be due or owing to defendant, as he or they may deem advisable or proper.

(4) That said receiver or receivers be authorized and empowered to continue the operation of the business of defendant as an entirety and to that end to employ and discharge and pay the compensation, salaries and wages of such attorneys, managers, superintendents, agents, accountants, bookkeepers, servants, workmen and employes as he or they may deem necessary or advisable in connection with the custody, control, preservation and management of the properties and business of said defendant; and to protect and manage the business of the defendant and its subsidiary companies as an entirety, according to the customary and usual manner of conducting similar businesses, under the orders and directions of this Court, and until the further order of this Court in the premises; and that defendant, its officers, managers, servants, agents

and employees, creditors of defendant and all other persons, firms and corporations be required forthwith to deliver up to said receiver or receivers and to transfer and convey to him or them all and every part of the property of defendant wheresoever situated.

(5) That in managing and operating the business of defendant, or in the process of the liquidation of the assets of said defendant, said receiver or receivers be authorized to act in association with any ancillary receiver or receivers who may be appointed by any other court to take possession of and operate any property or assets of defendant, or in which defendant may have an interest, situated outside the territorial jurisdiction of this court, [fol. 47] and to co-operate with any ancillary receiver or receivers in continuing, managing and operating said business as a whole.

(6) That all creditors and stockholders of defendant and all other persons, firms and corporations be enjoined from instituting or prosecuting or continuing the prosecution of any actions, suits or other proceedings at law or in equity or under any statute against defendant, and from levying any attachments, executions or other processes upon or against any of the properties of defendant, or from taking or attempting to take into their possession any part of the property of defendant and from doing any act whatsoever to interfere with the possession and management by said receiver or receivers of the properties and business of defendant or in any way to interfere with said receiver or receivers in the discharge of his or their duties or to interfere in any way with the administration and disposition in this suit of the affairs and properties of defendant.

(7) That a writ or writs of injunction issue out of and under the seal of this Honorable Court directing, enjoining and restraining defendant and its stockholders, directors, officers, superintendents, managers, attorneys, agents and employees, and all other persons, firms and corporations, from interfering with, transferring, selling or disposing of any of the property or income of defendant or from taking possession of or attaching or levying upon, or attempting to sell or dispose of in any manner, any part of the property of defendant.

(8) That at such time or times as may be found just and proper the properties of defendant may be ordered to be sold in whole or in part in such manner and upon such terms and conditions as this Honorable Court shall deem [fol. 48] just and equitable, and that any such order of sale shall make proper and suitable provision for the preservation of all equities, rights, priorities, claims and liens of the creditors of defendant, and shall provide for the sale of the property of defendant subject to or free and clear of any and all liens and encumbrances, in whole or in part, in such manner and upon such terms as this Honorable Court may direct, and that the proceeds of any such sale be distributed among those entitled thereto, as this Honorable Court may adjudicate, and that in case of any sale herein of the property of defendant, it and its necessary officers, agents and attorneys may be directed to make, execute and deliver to the accepted purchaser or purchasers upon any such sale such releases, bills of sale and conveyances as may be necessary or proper to vest in such purchaser or purchasers the title to all and singular the purchased properties; or that the properties of defendant may be returned to defendant if and to the extent that proper provision shall be made for the claims of complainant and other creditors of the defendant.

(9) That a writ of subpoena under the seal of this Honorable Court may be granted to the plaintiff directed to defendant, commanding it on a certain day therein named, under a certain penalty, to appear before this Honorable Court to answer (but not under oath, an answer under oath being hereby expressly waived) this bill of complaint and each and every statement and allegation herein made, and further to perform and abide by such orders, directions and decrees as may be made against it in the premises and as shall seem proper and right in equity and in good conscience.

(10) That the plaintiff may have such other and further relief in the premises as the nature and circumstances [fol. 49] of this case may require and as to this Honorable Court may seem just and proper.

Milon Stone, Plaintiff.

Herbert J. Friedman, Solicitor for Plaintiff.

STATE OF ILLINOIS,
County of Cook:

Milon Stone, being first duly sworn, on oath says that he is the plaintiff in the above entitled cause, and has read the foregoing bill of complaint by him subscribed and knows the contents thereof, and says that the same is true of his own knowledge, except as to the matters therein stated to be on information and belief, and as to those matters he believes said bill of complaint to be true, and further that deponent has knowledge of the facts upon which the special relief pending suit is asked.

Milon Stone.

Subscribed and sworn to before me this 15th day of June, A. D. 1932. Jeanette Levin, Notary Public. (Seal.)

[fol. 50] UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

I, Roy H. Johnson, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that the annexed and foregoing is a true and full copy of the original Bill of Complaint filed June 16, A. D. 1932, in cause entitled: Milon Stone vs. The Hartman Corportion, a corporation, Equity No. 11961, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois this 10th day of June, A. D. 1943.

Ray H. Johnson, Clerk. Daniel W. Lean, Jr., Deputy Clerk.

[fol. 51] EXHIBIT 2-B, ANNEXED TO FOREGOING STIPULATION OF FACTS

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

In Equity No. 11961

MILON STONE, Plaintiff,

vs.

THE HARTMAN CORPORATION, a Corporation, Defendant

ORDER APPOINTING RECEIVERS

This cause coming on to be heard on the bill of complaint herein and the answer thereto of defendant admitting the allegations of said bill of complaint and said answer and having heard the arguments of counsel, and being fully advised in the premises, it is

Ordered, adjudged and decreed:

1. That Martin L. Straus and Elias Mayer, of the City of Chicago, Cook County, Illinois, be, and they hereby are, appointed Receivers of said defendant The Hartman Corporation, a corporation, and of all and singular the business, assets and property, real, personal and mixed, of said defendant, of whatsoever kind and description and where-[fol. 52] soever situated the same may be, including as part of such property all stocks, bonds, deeds, leases, contracts, rights, choses in action, credits, accounts receivable, leasehold interests and privileges, cash in bank and all other monies, rents, profits and income accrued, accruing and to accrue, and all books, accounts, records and other books and papers, and all other kinds and species of property or property rights of whatsoever kind or nature or wherever situated the same may be.

2. That said Receivers be, and they are hereby authorized and directed to take immediate possession of all and singular said business, assets, property and property rights hereinabove mentioned wheresoever situated or found, subject to any and every lawful lien upon or pledge of any such property, and to preserve and protect said property and the rights and titles of the defendant in and to the same, and to conduct, carry on and manage the business of said

defendant, and to exercise all and singular defendant's rights, authorities, franchises and privileges, in such manner and to such extent as in their judgment may be necessary or desirable; and that said Receivers are hereby authorized to make leases for the necessary space in the maintenance and operation of said business of defendant, and to retain, employ, discharge and fix the compensation of all necessary officers, directors, managers, superintendents, agents, accountants, bookkeepers, attorneys and employees for the due administration and management of the properties and of the business of said defendant; to keep the property of said defendant insured to such extent as said Receivers may deem advisable; to carry out and perform such existing contracts and agreement as may be necessary for the preservation of said property and business, or any part thereof, and of the rights of defendant therein; to enter into and perform other contracts in the [fol. 53] regular course of the business of defendant, which may in the judgment of said Receivers be necessary or desirable in order to conduct said business to the best interests of defendant and its creditors; to collect and receive all outstanding accounts, things in action, or credits due or owing to said defendant, and to hold and retain the net revenue thereof, for distribution or disbursements pursuant to the order of this Court; and to otherwise have and exercise all the powers of receivers in equity usual in such cases. Said Receivers shall cause all monies coming into their hands under and by virtue of the powers hereby conferred to be deposited in responsible banks or trust companies to the credit of said Receivers in their official capacity, and shall report to this Court the banks or trust companies selected by them for such deposit.

3. That the defendant and all persons, firms and corporations in possession or control of any of defendant's property or assets hereinabove mentioned are, and each of them is, hereby ordered forthwith to deliver the same to said Receivers, or their duly constituted representatives; and said Receivers are hereby authorized and empowered to bring suit for, collect, receive and take into their possession all the property and assets of defendant hereinabove mentioned, and to institute, prosecute, become party to, intervene in, compromise or defend suits and actions at law or in equity, or otherwise, for the recovery or protec-

tion or maintenance of any of said property or assets of defendant, as they may deem necessary or proper, including the institution and prosecution of such ancillary proceedings in any court or courts of the United States or of any state or of any foreign nation, as they may deem advisable, and including also any other suits, actions or proceedings at law or in equity, or otherwise, in which defendant may have any interest as plaintiff, defendant or [fol. 54] otherwise, with the power to continue any such pending suits, and to defend or otherwise dispose of any such proceedings, suits or actions; to settle, compound or make allowance on any or all debts now due and owing or which may hereafter be due or owing to defendant, as said Receivers may deem advisable or proper; said Receivers are further authorized to execute in their own names, or in the name of the defendant, all necessary appeal, supersedeas, injunction, or other bonds which may be required by law or in carrying out this order or any other order of this Court, and to that end to enter into contracts with surety companies as sureties on such bonds.

4. That said Receivers are further authorized, from monies received by them from time to time from any source, to make proper payment, in their discretion, of current and unpaid payrolls, also of all bills for merchandise, materials and supplies, incurred in the ordinary operation of the business of said defendant corporation from time to time, also to pay the expenses of maintaining and operating the said business and property from and after this date, and all expenses of protecting the rights and titles of said defendant corporation and prosecuting and defending suits, and also to pay any taxes and assessments levied upon said property and assets, or any part thereof, which, in the judgment of said Receivers, it is necessary to pay; and, if needful, in their judgment, in order to comply with the directions herein, in whole or in part, to borrow money and issue Receiver's certificates therein, upon such terms as the Court may by order hereinafter approve and direct.

5. That the plaintiff and the Receivers appointed herein are authorized to apply to any other court, or courts, of competent jurisdiction for such order, or orders, in the premises as the plaintiff or the Receivers may deem neces- [fol. 55] sary or proper in aid of the orders issued by this Court, or to apply from time to time to this Court for any

further orders or directions to said Receivers; and this Court reserves the right and jurisdiction to make, from time to time, such further orders, amplifying, extending, limiting or otherwise modifying this order as to it may at any time seem proper. In case of the death, resignation or removal of any of Receivers hereby or hereafter appointed, and the appointment of a successor, or successors, all of the provisions of this order shall apply to such successor, or successors, without further order or direction of the Court.

6. That in the management and operation of said business, said Receivers are hereby authorized to act in association with any ancillary receiver, or receivers, who may be appointed by any other court to take possession of and operate any property or assets of defendant, or in which defendant may have an interest, situated outside the territorial jurisdiction of this Court, and to co-operate with any ancillary receiver, or receivers, in continuing, managing and operating said business.

7. That said Receivers shall retain possession of said property and business of defendant, and shall continue to discharge the duties and trusts aforesaid until the further order of this Court in the premises; said Receivers shall open and keep proper books of account of all monies received and disbursed by them, and shall, from time to time, make reports to this Court of their doings in the premises, and apply to this Court for such other and further orders and directions as they may deem necessary or requisite for the due administration of said trust, including the power to borrow money on Receivers' certificates, or otherwise, and to give security therefor.

[fol. 56] 8. That said defendant, its officers, directors, agents, attorneys and employes, creditors and stockholders, and all other persons, firms and corporations, be, and they are hereby restrained and enjoined from instituting or prosecuting or continuing the prosecution of any actions, suits or other proceedings at law or in equity, or otherwise, against defendant, and from levying any attachments, executions or other processes upon or against any of the properties or assets of defendant, or in any manner whatsoever disturbing any operation of the property and business for which said Receivers are hereby appointed, or from taking possession of or in any way interfering with

said property or any part thereof, or from interfering in any manner to prevent the discharge by said Receivers of their duties, or the operation of said business and property under the order of this Court.

9. That said Receivers shall, as soon as practicable, within 3 days from this date, execute and file with the clerk of this Court a bond in the sum of Fifty Thousand Dollars ($50,000.00), with one or more sureties, to be approved by one of the judges of this Court, for the benefit of whom it may concern, conditioned that they will faithfully discharge the duties of their offices of receivers, and duly account for all monies and property that may come into their hands, and abide by and perform all things which they as said Receivers may be directed to do herein and in any ancillary proceeding wherein they may be appointed as receivers.

Enter:

(Signed) James H. Wilkerson, Judge.

June 16, 1932.

[fol. 57] EXHIBIT 3-C, ANNEXED TO FOREGOING STIPULATION OF FACTS

TO THE STOCKHOLDERS:

We submit herewith consolidated balance sheet and Surplus account for the year ended December 31, 1931, as certified by our accountants, Messrs. Haskins & Sells.

During the depression, your Company's sales dropped. With a decrease in commodity prices, the worth of its inventories declined. Unprecedented credit losses were incurred due to widespread unemployment. These causes account for $1,800,000 of the year's losses, of which the greater portion was charged against current operations. Capital assets shrunk materially in value and were charged against surplus.

Adverse business conditions presented a situation which had to be courageously and constructively met to assure the corporation's future welfare. Many changes in policy were inaugurated and are now being pursued in order to improve the corporation's operations in succeeding years as rapidly as conditions will permit. The full results should

be reflected in present and future operations. Among these are the following:

(1) All stores beyond a hundred mile radius of the main store in Chicago have been closed in order to assure more efficient supervision and operation.

The saving of rents on closed stores and the revision of rentals on operated stores generally to a sales percentage basis already accomplished will save the Company in ensuing years approximately $350,000 per annum. This saving is being increased as we adjust other leases.

(2) We have charged to surplus $761,648 as a result of the loss incurred in the closing of these stores. This loss cannot reoccur.

[fol. 58] (3) The following accomplishments as a result of our new policies will reduce the use of working capital per dollar of sales by approximately fifty per cent, and also curtail our credit losses materially:

(A) Tripling our cash business.
(B) More than doubling our down payments.
(C) Greatly increasing the rate of collections.

(4) Our inventories have been reduced from $2,050,000 on December 31, 1930, to $1,270,000 on December 31, 1931. They are marked down to a basis as low or lower than our cash competitors, and we now add a more adequate charge for credit extension, thereby absorbing the extra cost of credit sales.

(5) We have cut expenses not only in the usual ways, operating with lesser personnel at a smaller average wage, reducing salaries, wages, etc., but also by the introduction of new money-saving systems and methods.

(6) Our aggressive sales policy has stemmed the tide of losing sales volume with the result that in the last three months of 1931, we showed an increase in sales volume, and but for the progressively bad general conditions prevailing during the first three months of 1932, would have continued to show this increase. Nevertheless, we show a decrease of only 8.10% during the first quarter of 1932, and 5.28% during the month of March, 1932, as against average loss of volume in comparable lines of business of many times this

amount. (These figures do not include the newly inaugurated Apparel Department.)

(7) Monies borrowed have been reduced from a peak of $7,900,000 in 1930 to $5,872,000 at the end of 1930, to [fol. 59] $3,250,000 at the end of 1931, and to $2,800,000 on this date, thus effecting large savings in interest. Gross installment accounts receivable of $9,925,000, including accounts sold at the end of 1930, have been collected and reduced to $6,040,000 on December 31, 1931.

In line with good business practice, a reduction of bookkeeping charges of more than $250,000 per year has been accomplished by writing down to the nominal figure of $1.00, all furniture, delivery equipment, building improvements, etc., and a substantial reserve for contingencies of $1,250,000 has been set up.

Furthermore, the Directors have also fixed the capital represented by Class "B" shares at $10.00 a share and have thereby made additions to capital surplus, as shown in the accompanying balance sheet.

Profits for 1932 are unlikely in the face of current conditions, but losses should be greatly minimized. With a return to more normal business and economic conditions, profits again should be realized. It is estimated that our loss for the first quarter of 1932 will show at approximately $400,000 less than for the corresponding period of 1931.

The Company is cautiously extending its operations into other lines of merchandise salable for cash only and at low operating expense.

We wish to express appreciation to the shareholders, executives and employees for their loyal cooperation.

Let us look forward with confidence to the future business in the United States, and with the expectation that the profitable business, which this 67 year old Company uninterruptedly enjoyed until the present depression, will be restored.

By Order of the Board of Directors, Martin L. Straus, President.

Chicago, Illinois, April 4, 1932.

[fol. 60] THE HARTMAN CORPORATION (Incorporated in Virginia) and Subsidiary Companies

Consolidated Balance Sheet December 31, 1931

(Adjusted to Give Effect to a Reduction, Authorized by the Directors on April 4, 1932, in the Stated Value of Class "B" Capital Stock and to a Write-Down of Fixtures, Delivery Equipment, and Leasehold Improvements to a Nominal Valuation of $1.00.)

ASSETS

Current Assets:		
Cash		$221,124.40
Cash deposited under collateral trust agreement		140,927.85
Receivables pledged as collateral to collateral trust notes:		
Customers' instalment accounts	$6,040,900.93	
Less reserve for doubtful accounts	664,499.10	
Customers' instalment accounts—Net		5,376,401.83
Instalment notes (including accrued interest)	$638,051.73	
Less reserve for losses	105,898.64	
Instalment notes—Net		532,153.09
Receivables applicable to Home Complete Division:		
First mortgages (including accrued interest)	$996,811.55	

[fol. 61]

Second mortgages, contracts, notes and accounts receivable	398,919.18	
Total	$1,395,730.73	
Less reserve for losses	122,125.00	
Remainder		1,273,605.73

Receivables not pledged:		
Notes receivable—Miscellaneous (including accrued interest)	43,225.50	
Accounts receivable—Sundry	120,469.26	
Total		163,694.76
Merchandise and supplies (physical inventories at the lower of cost or market; not audited as to quantities)		1,270,183.56
Total current assets		$8,978,091.22
Investments (at book value):		
Affiliated Company and Trust not consolidated (The Seventh and Mitchell Realty Corporation, $65,-[illegible].84, and Hartman Realty Trust, $839,364.66)	$905,342.50	
Equity in real estate	133,315.09	
Other	331,831.62	
Total investments		1,370,489.21
Fixtures, Delivery Equipment, and Leasehold Improvements—Nominal Valuation		1.00
Deferred Charges		59,524.15
Good-Will		4,992,992.39
Total		$15,401,097.97

[fol. 62] LIABILITIES

Current Liabilities:	
Collateral trust notes (receivables pledged as collateral—See contra)	$3,250,000.00
Accounts payable	435,972.49
Purchase money obligations, maturing within one year	56,000.00
Accrued accounts:	
Real estate and personal property taxes (estimated)	322,921.02
Miscellaneous	133,919.75
Total current liabilities	$4,198,813.26

Purchase Money Obligation and Notes Payable—Deferred Maturities		35,466.00
Hartman Realty Trust—Accounts Payable Deferred		234,159.21
Federal Income Tax (Including Accrued Interest)—in Dispute		272,000.00
Reserve for Contingencies		1,250,000.00
Net Worth:		
Capital stock:		
Class "A" — Authorized, 200,000 shares of no par value; issued, 59,072 shares	59,072.00	
Class "B"—Authorized and issued, 335,121 shares at a stated value of $10.00 a share	3,351,210.00	
Total capital stock	$3,410,282.00	
Capital surplus, per accompanying summary	6,000,377.50	
Total net worth		9,410,659.50
Total		$15,401,097.97

[fol. 63] EXHIBIT 4-D, ANNEXED TO FOREGOING STIPULATION OF FACTS

May 4, 1932.

To the Stockholders:

Newspapers have recently carried announcement of the results of the annual meeting of The Hartman Corporation at which there were voted 248,000 shares of stock in favor of the management and no stock voted in opposition. The directors and officers of the corporation appreciate this vote of confidence by its stockholders. Unity and harmony are essential if we are to overcome the adverse forces affecting business.

While the election of our general counsel, Elias Mayer, represented the only addition to the directorate, stock-

holders will be interested in noting the identity of the individuals on the board of their corporation:

H. W. Blumenthal, New York, Partner, Hallgarten & Co.
Adolf Drey, Chicago, Second Vice-President, The Hartman Corporation.
Melvin L. Emerich, Chicago, Partner, Hallgarten & Co.
Sidney H. Kahn, Chicago, Vice-President, Straus National Bank and S. W. Straus & Co.
Morton J. May, St. Louis, President, The May Department Stores Company.
Elias Mayer, Chicago, Attorney-at-Law.
Barton H. Sackett, Chicago, Secretary, The Hartman Corporation.
Martin L. Straus, President and Chairman, The Hartman Corporation.
Harold B. Wess, Chicago, Executive Vice-President, The Hartman Corporation.

At the board meeting yesterday the following officers were elected:

[fol. 64] Chairman and President, Martin L. Straus; Executive Vice-President (General Manager), Harold B. Wess; Second Vice-President (Sales Promotion Manager), Joseph S. Batt; Second Vice-President (Division Merchandise Manager), Jack Blostein; Second Vice-President (Division Merchandise Manager), Adolf Drey; Second Vice-President (Manager Wisconsin Div.), Charles A. Frank; Second Vice-President (Manager of Operations), Barton H. Sackett; Secretary, Barton H. Sackett; Treasurer and Assistant Secretary (Comptroller), William H. Yates; Assistant Secretary and Assistant Treasurer, Meyer Kuit.

The Executive Committee of the Board of Directors comprises Messrs. Straus (Chairman), Wess, Mayer and Emerich.

Stockholders will be interested in knowing that borrowed monies have been further reduced—an effort on which the management has concentrated for the last year. The total is down from a peak of $7,900,000 in 1930 to $2,675,000 on April 30—a reduction of $575,000 since the first of this year and a new low since 1924.

Business has not shown any improvement but your corporation has shown a much smaller sales decline than most

merchandising companies. In the four months ending April 30, 1932, net sales were 8.68 per cent less than in the corresponding period of last year.

[fol. 65] We believe that this comparatively favorable showing is directly traceable to the fact that The Hartman Corporation has been passing on to its customers the full benefit of low prices for merchandise now prevailing, and has, as a result, been able to offer the best values per dollar in its history. We are making every possible effort to bring these to the attention of more people, and do the largest volume of business that can be attracted to our stores.

We earnestly solicit the assistance of our shareholders, particularly those within the trading area of our retail stores. You are invited to visit our nearest store and see for yourself how it is conducted, and what is offered. The style and quality of merchandise and service, the low prices, make Hartman stores the logical place for your own purchases, and for recommendation to your friends. A considerable number of such recommendations result in added sales, so that you will directly benefit yourself as a stockholder.

Several months ago we installed experimentally a cash and carry, self-service women's ready-to-wear department in the Loop Store at Wabash Ave. and Adams St., Chicago. This experiment, which was undertaken at a minimum of expense, has been growing satisfactorily to date. Sales have run as high as 1,000 garments a day. If this record is maintained over a sufficient time to indicate the department's reliability as a sales and earnings producer, similar departments will be installed in other stores.

The management of Hartman Corporation is constantly alert to realize on new merchandising developments touching the fields its covers. This aggressive attitude will, I am confident, give the corporation the best showing during the remainder of the year that business conditions will permit.

Sincerely, Martin L. Straus, President.

[fol. 66] EXHIBIT 5-E, ANNEXED TO FOREGOING STIPULATION OF FACTS

June 7, 1933.

To the Creditors of Hartman Furniture & Carpet Company and the Stockholders of The Hartman Corporation:

The undersigned, Hartman's Incorporated, has been organized under the laws of the State of Delaware for the purpose of acquiring at the bankruptcy sale the business and property of Hartman Furniture & Carpet Company (herein called the "Company") and of consummating the program outlined in the letter of the Stockholders' Protective Committee dated April 27, 1933.

In order to procure the underwriting of debentures sufficient to provide the cash requirements under the program outlined in the Committee's letter, the present management voluntarily agreed to purchase $150,000 of debentures with the accompanying stock, and to subordinate the principal of (but not the interest on) said $150,000 of debentures to a like principal amount of debentures; the purchasers of the $150,000 of debentures enjoying priority having agreed to deliver the accompanying stock to the present management as and when said debentures have been retired. The remaining $100,000 of debentures authorized were free and unsubordinated.

The sale of the business and property of the Company was held by the bankruptcy court on May 26, 1933, and the undersigned was the successful bidder at said sale, the purchase price being:

(*a*) $501,000.00 in cash; and

(*b*) Agreement to procure a waiver of claims of certain affiliated companies.

[fol. 67] Inasmuch as the amount of cash required in connection with this purchase is substantially in excess of the amount contemplated in the program outlined in the Committee's letter, it has become necessary to modify the plan set out in the Committee's letter by increasing the authorized debentures from $400,000 to $600,000; by subordinating the principal of (but not the interest on) the additional $200,000 of debentures to the same $150,000 of debentures so given priority under the original plan and by increasing the authorized number of shares from 150,000 to 225,000.

The undersigned offers to issue to each creditor of the Company, without payment by the creditors, one share of fully paid and non-assessable capital stock of the par value of $1.00 per share, for each $100.00 of provable claims as may be filed and allowed in the bankruptcy proceedings on or before June 26, 1933, or as shown upon the books of the Company.

In addition, the undersigned also offers the privilege of subscribing for units of its debentures and capital stock upon the following basis:

(*a*) Creditors of the Company may, for each $100.00 of claims filed and allowed in the bankruptcy proceedings on or before June 26, 1933, or as shown on the books of the Company, subscribe for one unit consisting of a Six Per Cent Sinking Fund Debenture in the face amount of $10.00 and two shares of capital stock of the par value of $1.00 per share, at a subscription price in cash of $10.00 per unit, plus accrued interest on the debenture at 6% from June 1, 1933 to date of payment.

(*b*) Holders of Class "A" and Class "B" stock of The Hartman Corporation may, for each ten shares of either class of stock, subscribe for one unit consisting of a Six Per Cent Sinking Fund Debenture of the [fol. 68] *of the* par value of $1.00 per share, at a subscription price in cash of $10.00 per unit, plus accrued interest on the debenture from June 1, 1933 to date of payment.

The foregoing debentures, for which the privilege of subscription is herewith offered, are subject to a certain subordination agreement of Hartman's Incorporated dated June 1, 1933, providing in substance that the principal of (but not interest on) the debentures herewith offered to creditors and stockholders shall be subordinated to the principal payment upon debentures in the aggregate amount of $150,000.00, referred to and described in said agreement, copies of which are on file and may be inspected at the office of Barton H. Sackett, Trustee, and Hallgarten & Co., Chicago, Fiscal Agent, and each debenture will bear an appropriate legend to that effect.

The entire proceeds of debentures and accompanying stock subscribed for by creditors and stockholders will be

first used either to cancel the subscriptions to, or redeem and retire, unsubordinated debentures and debenture enjoying priority, at par and accrued interest.

The foregoing stock given to creditors and the privileges of subscription herewith offered are in addition to the cash dividends which creditors are entitled to receive in the bankruptcy proceedings.

All subscriptions by creditors of Hartman Furniture & Carpet Company must be accompanied by the full cash subscription. All subscriptions by stockholders of The Hartman Corporation must be accompanied by either certificates of deposit of the depository of the Stockholders' Protective Committee or certificates of stock of The Hartman Corporation, endorsed in blank, in respect of which the subscription is made, and also by the full cash subscription.

The undersigned reserves the right, in the event that more than thirty-five thousand units are subscribed for [fol. 69] by the creditors and stockholders, to allocate the units ratably in proportion to the subscriptions, and to reject the excess subscriptions.

No subscriptions will be accepted from stockholders for fractional units and no stock will be issued to, or subscriptions accepted from, creditors with respect to claims less than $100.00 or for odd amounts in excess of $100.00 or multiples thereof.

The authorized capital stock of Hartman's Incorporated is 225,000 shares, of the par value of $1.00 a share. An issue of Six Per Cent Sinking Fund Debentures in an aggregate principal amount not exceeding $600,000.00 has been authorized. The Debentures will be dated June 1, 1933, mature June 1, 1935, bear interest at the rate of 6% per annum, payable semi-annually, will be registered and will be subject to redemption, in whole or in part, at any time upon ten days' notice to the registered holder, on payment of the par value thereof plus accrued interest to the date of redemption. The Debentures will be issued pursuant to an Indenture of Trust dated June 1, 1933, making provision, among other things, for a pledge as security for the payment of the Debentures, of the equity in the accounts receivable, notes and other collateral now pledged to secure the Collateral Promissory Notes of the Company, remaining after the payment in full of all such notes.

Hallgarten & Co. of New York and Chicago have purchased 15,000 units, each consisting of $10.00 par value of

Debentures and two shares of capital stock and have underwritten 35,000 additional units, or so many of such units as the creditors and stockholders do not subscribe for pursuant to this offer. 87,000 shares of the capital stock and $30,000 cash have been reserved by the undersigned to be used in payment of the underwriting, reorganization and purchase expenses and for other corporate purposes. A summary of the appraisal of the property and assets pur- [fol. 70] chased, prepared by the bankruptcy court appraisers, without adjustment or valuation by the undersigned, is given herewith.

If you desire to avail yourself of the foregoing offer, you should fill in the enclosed subscription form and forward same, together with a check or money order for the full subscription price at the rate of $10.00 per unit and accrued interest (and in the case of stockholders, certificates of deposit or certificates of stock) to Hartman's Incorporated, 100 West Tenth Street, Wilmington, Delaware, on or before June 30, 1933.

Very truly yours, Hartman's Incorporated.

Note: We are advised by the Stockholders' Protective Committee that deposited stock certificates will be returned by the Committee's Depositary, First Union Trust and Savings Bank, Chicago, Illinois, upon surrender of certificates of deposit duly endorsed for transfer.

Summary of Report of Bankruptcy Appraisers as of April 19, 1933

1.	Merchandise at all stores		$152,641.83
2.	Store Furniture, Fixtures, and Trucks		59,597.20
	Accounts Receivable:		
3.	Equity in Pledged Accounts	$427,295.95	
4.	Free Accounts	94,538.20	
5.	Miscellaneous	7,958.42	529,792.57
6.	Promissory notes secured by Sales Contracts or Mtges		51,781.45
7.	Other Promissory Notes		9,000.00
8.	Stocks, Bonds, Warrants & other Securities		57,168.32
9.	Real Estate, Improved and Vacant		111,450.00
10.	Real Estate Mortgages and Contract		554,150.00
	Total		$1,525,581.37

[fol. 71] EXHIBIT 6-F, ANNEXED TO FOREGOING STIPULATION OF FACTS

EXHIBIT II

SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY

BENJAMIN GRAHAM, THERESE S. ROSENBLATT, MAXWELL HYMAN, Herbert W. Levy, and Guy W. Levy, co-partners, trading as Levy Brothers, and Edwin A. Seasongood and George C. Haas, co-partners, trading as Seasongood & Haas, Lillian Boehm, and Louis Boehm, Plaintiffs,

against

MARTIN L. STRAUS, SAMUEL E. KOHN, BARTON H. SACKETT, Edward G. Felsenthal, Adolph Drey, Morton J. May, H. Walter Blumenthal, Melvin L. Emerich, Sidney H. Kahn, The Hartman Corporation, Defendants

To the above named Defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiffs' attorneys within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, New York, December 16th, 1932.

Boehm & Zeiger, Attorneys for Plaintiffs, Office & P. O. Address, No. 30 Broad Street, Borough of Manhattan, New York City.

[fol. 72] SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY

BENJAMIN GRAHAM, THERESE S. ROSENBLATT, MAXWELL HYMAN, Herbert W. Levy, and Guy W. Levy, co-partners, trading as Levy Brothers, and Edwin A. Seasongood and George C. Haas, co-partners, trading as Seasongood & Haas, Lillian Boehm, and Louis Boehm, Plaintiffs,

against

MARTIN L. STRAUS, SAMUEL E. KOHN, BARTON H. SACKETT, Edward G. Felsenthal, Adolph Drey, Morton J. May, H. Walter Blumenthal, Melvin L. Emerich, Sidney H. Kahn, The Hartman Corporation, Defendants

The plaintiffs, by Boehm & Zeiger, their attorneys, suing on behalf of themselves as stockholders of The Hartman Corporation, and on behalf of the said Company and all other stockholders of said Company similarly situated, who may join with the plaintiffs in, and contribute to the expenses of, this suit respectfully allege:

1. That the plaintiff, Benjamin Graham, at all the times mentioned in the complaint, was and now is, the owner and holder of 1,600 shares of the Class "A" stock of the defendant, The Hartman Corporation, hereinafter called the "Corporation".

2. That the plaintiff, Therese S. Rosenblatt, at all the times mentioned in the complaint, was, and now is the owner and holder of 400 shares of the Class "A" stock of the defendant Corporation.

[fol. 73] 3. That the plaintiff, Maxwell Hyman, at all the times mentioned in the complaint, was, and now is the owner and holder of 100 shares of the Class "A" stock of the defendant Corporation.

4. That at all the times mentioned in the complaint, the plaintiffs, Herbert W. Levy and Guy W. Levy, were, and still are, co-partners, trading under the firm name of Levy Brothers, and were, and still are, the owners and holders of 300 shares of the Class "A" stock of the defendant Corporation.

5. That at all the times mentioned in the complaint, the plaintiffs Edwin A. Seasongood and George C. Haas, were, and still are, co-partners, trading under the firm name of Seasongood & Haas, and were, and still are, the owners and holders of 900 shares of the Class "A" stock of the defendant Corporation.

6. That the plaintiff, Lillian Boehm, at all the times mentioned in the complaint, was, and now is the owner and holder of 1100 shares of the Class "A" stock of the defendant Corporation.

7. That the plaintiff, Louis Boehm, at all the times mentioned in the complaint, was the owner of 7 shares of Class "A" stock and 115½ shares of the Class "B" stock of the defendant Corporation.

8. That at all the times hereinafter mentioned, each and all of the plaintiffs were and still are residents of the State of New York.

9. Upon information and belief, that all the times hereinafter mentioned, the defendant Corporation was, and still is, a corporation organized under, and existing by vir- [fol. 74] tue of, the laws of the State of Virginia, engaged in the ownership and operation, through divers wholly-owned subsidiaries, of a chain of retail stores for the sale of house furniture, furnishings, and household goods, in Chicago, Illinois, and other cities, principally in the Middle West of the United States.

10. Upon information and belief, that the capital stock of the Corporation consists of two classes of stock of no par value, namely, Class "A" stock, of which the Corporation is authorized to issue 200,000 shares, of which there was outstanding on and prior to January 1st, 1930, 58,973 shares, and Class "B" stock, of which there was authorized and outstanding on and prior to January 1st, 1930, 400,000 shares; that the Class "A" stock is preferred over said Class "B" stock to the extent of the payment of an annual cumulative dividend of $2.

11. Upon information and belief, that the defendants, Martin L. Straus, Samuel E. Kohn, Barton H. Sackett, Edward G. Felsenthal, Adolph Drey, Morton J. May, H. Walter Blumenthal, Melvin L. Emerich, and Sidney H. Kahn were each and all duly elected directors of the said

Corporation in the year 1929, and have, from year to year since that time, been duly and regularly elected directors of the said Corporation, and that immediately after their election each of them accepted their said office and trust, and took upon himself the duties and responsibilities pertaining to the office of director of said Corporation, and that each and all of them have, during all the times mentioned in the complaint, continued to act and serve as such directors of said Corporation, except the defendants, Samuel E. Kohn and Edward G. Felsenthal, who continued to act as such directors until on or about April 26th, 1932.

[fol. 75] 12. Upon information and belief, that the defendants, Martin L. Straus, Samuel E. Kohn, Barton H. Sackett, Edward G. Felsenthal, and Adolph Drey, were duly elected President, Vice-President, Secretary, Treasurer, and Second Vice-President, respectively, of the said Corporation in the year 1929, and have, from year to year since that time, been duly and regularly elected as such officers of the said Corporation, and that each of them accepted his said office and trust, and took upon himself the duties and responsibilities pertaining thereto, that the said defendants in this paragraph mentioned, have, at all the times mentioned in the complaint, continued to act and serve as such officers of the said Corporation, except the defendants Samuel E. Kohn and Edward G. Felsenthal, who continued to act as such officers until on or about April 26th, 1932.

13. That it was the duty of the said defendants, as such officers and directors, honestly, diligently, prudently and providently to administer the business, affairs, and property of the said Corporation, to conserve the assets of the Corporation and to prevent their waste and dissipation, and otherwise to faithfully and diligently perform all other duties devolving upon them as such officers and directors of the Corporation.

14. Upon information and belief, that the said defendants, as officers and directors, as aforesaid, utterly failed and neglected to perform their official duties as such officers and directors, but, on the contrary, in violation of their duties as such officers and directors and their fiduciary obligations to the Corporation and its stockholders, and in abuse of their power and authority, negligently, imprudently, improvidently, fraudulently, and illegally adminis-

tered the business, and property of the said Corporation, conducted its affairs in an incompetent, wasteful and ex-
[fol. 76] travagant manner, and grossly mismanaged the same, made improvident contracts and purchases in behalf of the Corporation, caused and permitted the Corporation to pay excessive, wasteful and extravagant salaries, and caused, suffered and permitted the working capital of the Corporation to be seriously depl ed, and its assets to be wasted and diminished in value, and curtailed the profitable and successful operation of its business, and substantially impaired its credit and good-will, and otherwise acted in a manner destructive of the Corporation and the rights of its stockholders, to the great damage, loss and prejudice of the Corporation and its stockholders.

15. Upon information and belief that in and about the years 1929 and 1930, the defendant directors and officers caused the Corporation to acquire, in most part by the purchase in the open market for cash, 64,879 shares of its Class "B" stock then outstanding, at an aggregate cost of approximately $1,422,000, which the Corporation paid therefor, representing an average cost of $22 per share.

16. Upon information and belief that at the time the defendant directors and officers undertook to acquire the said stock for the Corporation, the latter had very limited cash resources, having current liabilities in excess of $5,000,000 and cash of approximately only $1,385,000, and was operating its business at a loss, and that the Corporation in such circumstances could ill afford to apply its cash and other current assets to the purchase of its own junior capital stock not essential to the conduct of its business, and to thereby substantially deplete its limited cash resources required for the proper and profitable transaction of its business; and that by reason of the said purchases, the working capital of the Corporation was seriously depleted, and its business impeded and impaired, and the
[fol. 77] Corporation, during the said year 1930, sustained a loss in the operation of its business of $3,350,000, representing approximately twenty (20%) per cent of its total assets, and during the following year of 1931, sustained a further loss of approximately $7,424,000.

17. Upon information and belief, that during the same period, the Corporation was indebted upon notes and ac-

counts payable in the sum of $3,488,000, upon which interest charges amounting to over $400,000, accrued during the year 1930, which the Corpoation was obliged to, and did, pay, but which, however, would have been materially reduced and a considerable savings of interest effected, had the defendant directors and officers applied the said cash funds to the reduction of its existing obligations, instead of to the purchase of its junior Class "B" stock.

18. Upon information and belief, that part of the Class "B" stock of the Corporation so purchased by it; as aforesaid, was sold to it by the defendant directors and officers, and/or by persons acting for them and in their interest, through the open market and otherwise, and that the said defendants personally benefited and profited thereby.

19. Upon information and belief, that the defendants caused said stock, so acquired by the Corporation, at an average cost of $22 per share, to be placed in its Treasury, and thereafter caused the said stock to be retired, when its market value had declined to $3 per share.

20. Upon information and belief, that in and about the year 1929, the defendant directors and officers caused the Corporation to purchase Class "B" stock in the open market, and to re-sell the same to its employees at the price of $16 per share, under agreements with said employees to repurchase the said stock at the same price from the said employees, at the latter's option, all without the knowledge [fol. 78] and consent of the stockholders of the Corporation. That the said purchases of the stock and the said re-purchase agreements, were imprudent, improvident, unfair, disadvantageous and prejudicial to the Corporation and to its stockholders, and imposed a burden upon the Corporation in the event of decline in the market price of the said stock without any compensating profit in the event of a rise in the market price thereof, and that the Corporation was obliged to, and did, purchase, under the said re-purchase agreement, large amounts of the said stock from the said employees at the price of $16 per share, when the market price had declined considerably below the said price, and thereby sustained considerable monetary loss, and suffered waste and dissipation of its assets.

21. Upon information and belief, that similar sales of the Corporation's stock were made to the defendant di-

rectors and officers under similar re-purchase agreements, and that the Corporation was caused to re-purchase a large amount of the said stock from the defendant directors and officers, pursuant to the said agreements, at the price of $16 per share, considerably in excess of the then market price thereof, to the Company's loss and damage.

22. Upon information and belief, that the defendant directors caused to be paid to themselves as officers, salaries and compensation largely in excess of the reasonable value of their services to the Corporation, and wasteful and extravagant.

23. Upon information and belief, that the defendant directors and officers aforesaid, with intent to deceive the stockholders of the Corporation, including the plaintiffs, and in order to lead them to believe that the Corporation was in sound financial condition, and to lull them into a false sense of security as to the nature, amount, and ratio [fol. 79], of its assets and liabilities, and thereby to prevent investigation and inquiry as to the true financial state and condition of the Company, its business and affairs, and the soundness of its management, caused false and misleading letters, statements, and reports to be issued by the Corporation and its Board of Directors, to its stockholders, including the plaintiffs, concerning the assets, liabilities, and financial condition of the Corporation, and concealed from the stockholders the true state, condition, and amounts of its assets and liabilities.

24. That by reason of the acts and mis-feasance, malfeasance, and non-feasance in office of the defendant directors and officers aforesaid, the working capital of the Corporation was materially depleted, its assets were greatly diminished, wasted, and dissipated, and its business seriously impaired and curtailed, and its credit and good-will destroyed, so that it became unable to profitably conduct and continue its business and to meet and discharge its obligations in regular course.

25. That the defendants are the executive officers of the Corporation and constitute the majority of its Board of Directors, and are in control thereof, and that without their consent and direction, this action cannot be brought by the defendant Corporation; that they are the same persons who

are charged with having participated in the acts of mis, mal, and non-feasance in office, alleged in the complaint. That by reason thereof demand upon the corporation to commence and prosecute an action against its aforesaid officers and directors to recover against them the damages which the Corporation has sustained by reason of their official mis-conduct, would be futile, and unavailing, and that the said Corporation has therefore been joined herein as party defendant.

26. That the plaintiffs have no adequate remedy at law.

[fol. 80] Wherefore, plaintiffs demand judgment as follows:

1. That the defendants and each of them, except The Hartman Corporation, be directed to account to the defendant Corporation for their official conduct as officers and/or directors thereof, as the case may be, in the management and disposition of the property and affairs of the said Corporation, and in respect to all of the matters set forth in this complaint;

2. That the liability of the defendants and each of them, be ascertained and determined, and that they be adjudged and decreed to pay into the Treasury of the defendant Corporation the amount of the loss and damage which shall be found to have been sustained by the Corporation by reason of their aforesaid wrongful acts and conduct;

3. That this Court make and award suitable allowance to the plaintiffs for counsel fees and other necessary disbursements incurred in the prosecution of this action on behalf of the defendant Corporation and stockholders, and that it be decreed that the defendant Corporation pay the same to the plaintiffs, and that the plaintiffs have judgment therefor, together with the costs and taxable disbursements of this action.

4. That the plaintiffs have such other and further relief as may be just, equitable, and proper.

Boehm & Zeiger, Attorneys for Plaintiffs, Office & P. O. Address, No. 30 Broad Street, Borough of Manhattan, New York City.

Verification.

[fol. 81] THE TAX COURT OF THE UNITED STATES

Docket No. 111621

LILLIAN BOEHM, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Petitioner's stock in The Hartman Corporation became worthless prior to 1937 and, therefore, deduction therefor is not allowed in that year.

Louis Boehm, Esq., for the petitioner.

P. J. Cavanaugh, Esq., for the respondent.

Memorandum, Findings of Fact and Opinion

The Commissioner determined deficiencies in the amount of $125.63 and $7,537.46 in the petitioner's income tax for the years 1936 and 1937, respectively.

All the issues with reference to the 1936 deficiency and certain of those concerned with that of 1937 have been conceded or abandoned by the parties, and effect will be given thereto in the computation under Rule 50.

The following issues are presented for the year 1937:

(1) Whether the petitioner's stock in The Hartman Corporation became worthless in 1937.

(2) Whether the respondent properly included in her gross income for 1937 the sum of $12,500 received by the petitioner in dismissing a stockholders' suit.

FINDINGS OF FACT

The facts were stipulated and as so stipulated are adopted as findings of fact. In so far as material to the issues presented, the facts are as follows:

[fol. 82] The petitioner, a married woman, resides in New York, N. Y. She filed her separate income tax return for the year 1937 with the collector of internal revenue for the third district of New York.

In 1929 the petitioner purchased 1,100 shares of the Class A stock of The Hartman Corporation, hereinafter called Hartman (Virginia), for $32,440. Hartman (Virginia) was incorporated in 1916 in the State of Virginia to acquire the

capital stock of the Hartman Furniture and Carpet Company, hereinafter referred to as Hartman (Illinois), and its affiliates. Hartman (Illinois) and its affiliates were engaged in the business of selling furniture, carpets, and household goods.

In June 1932, Martin L. Straus and Elias Mayer were appointed equity receivers for Hartman (Virginia) by the District Court of the United States for the Northern District of Illinois, Eastern Division. The receivers entered into possession of the property of Hartman (Virginia) and continued its business of buying and selling furniture and other household articles from the time of their appointment until on or about May 26, 1933.

The petitioner received a letter from Hartman (Virginia) enclosing its balance sheet of December 31, 1931, which showed assets and liabilities of $15,401,097.97 with a total net worth of $9,410,659.50. Accompanying the balance sheet was a statement of the board of directors dated April 4, 1932 addressed to the stockholders, setting forth the policy and procedure of the corporation due to the business depression and stressing the reduction of loans payable and of operating costs. On May 4, 1932, Martin L. Straus, president of Hartman (Virginia) sent another letter to the stockholders stating that business had not shown any improvement and outlining the measures being taken to counteract the existing business conditions.

[fol. 83] In 1933 a new corporation called Hartman's, Inc., was organized under the laws of the State of Delaware. As of May 26, 1933 Hartman's, Inc. purchased at a bankruptcy sale the assets of Hartman (Illinois), the wholly owned subsidiary of Hartman (Virginia), for the sum of $501,000 in cash and an agreement to procure a waiver of certain inter-company claims against the bankrupt estate. The stock of the new company was issued to the creditors of Hartman (Illinois) in settlement of claims, and to the stockholders of Hartman (Virginia) by subscription thereto. The stockholders of Hartman (Virginia) were given the right to subscribe for debentures and capital stock of Hartman's, Inc. The petitioner did not exercise the right of subscribing to the debentures and stock of Hartman's, Inc. and did not acquire any interest in that company in 1933 or thereafter.

On August 10, 1934, the receivers of Hartman (Virginia) filed a report with the court listing as assets $39,593.13 in

cash and a suit pending against the directors (the Graham suit) and as liabilities total outstanding claims amounting to $707,430.67. The receivers recommended that claims totaling $630,574.57 be allowed. By an order dated August 10, 1934, the court approved the report and also awarded $3,500 as compensation to each of the receivers and $5,000 as attorneys' fees.

The receivers filed a second report on July 11, 1935, listing as assets $27,192.51 in cash and the Graham suit pending against the directors and as liabilities the same amount of $707,430.67, representing the total outstanding claims. The receivers recommended that a dividend of 4 per cent be paid on the claims of $630,574.57 allowed and that one claim amounting to $176,856.10 be disallowed. By an order dated the same day the court adopted the report and recommendations of the receivers. On August 26, 1935, one of the two receivers was released from further duties.

[fol. 84] The remaining receiver filed a final report with the court on September 30, 1937. The sole remaining asset was cash in the amount of $1,909.94. Claims totaled $630,574.57. It was recommended that compensation totaling $900 be allowed the receiver and counsel and the remainder be distributed to the creditors. The court adopted the recommendations and discharged the receiver by an order dated September 30, 1937.

A suit against the directors, hereinafter called the Graham suit, was instituted on December 16, 1932 in the Supreme Court of the State of New York. The petitioner and eight other stockholders of Hartman (Virginia) were plaintiffs. The defendants were the corporation, Hartman (Virginia), and nine members of the company's board of directors, all of whom were financially responsible and several of whom were prominent business men. The plaintiffs brought the suit "on behalf of themselves as stockholders of The Hartman Corporation and on behalf of the said Company and all other stockholders of said Company similarly situated, who may join with the plaintiffs in, and contribute to the expenses of this suit."

The complaint set forth the plaintiffs' respective holdings of the capital stock of Hartman (Virginia),[1] its corporate

[1] Each of the plaintiffs owned a block of Class A stock. A plaintiff other than the petitioner also owned a block of Class B stock.

existence and purposes, the number of shares outstanding of Class A and Class B stocks, and alleged the facts that Class A was preferred over Class B as to dividends; that the individual defendants were elected to the board of directors in 1929 and thereafter (excepting two who acted until April 26, 1932); and that certain individual defendants were the officers of the company from 1929 and thereafter (excepting the two who served until April 26, 1932).

[fol. 85] The plaintiffs then charged the defendants with waste, extravagance, mismanagement, neglect, and the fraudulent violation of their duties as officers and directors of the corporation and demanded that the defendants render an accounting and pay into the treasury of the corporation the amount of the loss and damage sustained by it by reason of their wrongful acts.

The complaint charged the defendants with issuing false letters, statements and reports to the stockholders relating to the assets, liabilities and financial condition of the corporation and with concealing the true state and condition of the corporation from the stockholders, including the plaintiffs.

The complaint concluded with the following demand for judgment:

1. That the defendants and each of them, except The Hartman Corporation, be directed to account to the defendant Corporation for their official conduct as officers and/or directors thereof, as the case may be, in the management and disposition of the property and affairs of the said Corporation, and in respect to all of the matters set forth in this complaint:

2. That the liability of the defendants and each of them, be ascertained and determined, and that they be adjudged and decreed to pay into the Treasury of the defendant Corporation the amount of the loss and damage which shall be found to have been sustained by the Corporation by reason of their aforesaid wrongful acts and conduct;

3. That this Court make and award suitable allowance to the plaintiffs for counsel fees and other necessary disbursements incurred in the prosecution of this action on behalf of the defendant Corporation and stockholders, and that it be decreed that the defendant

[fol. 86] Corporation pay the same to the plaintiffs, and that the plaintiffs have judgment therefor, together with the costs and taxable disbursements of this action.

4. That the plaintiffs have such other and further relief as may be just, equitable, and proper.

During the years 1933 to 1936, inclusive, extensive examinations were made of certain of the defendants. Many hundreds of pages of testimony were taken and numerous exhibits were offered in evidence. Pursuant to an order of the New York Supreme Court the petitioner and her coplaintiffs paid expenses and counsel fees of certain of the defendants' attorneys amounting to approximately $800. The plaintiffs in the Graham suit expended approximately $2,000, exclusive of fees, in defraying expenses of their counsel while attending the examinations, in stenographic costs and printing charges.

At the conclusion of the examinations and shortly before the trial, negotiations were commenced for a settlement of the action and on February 20, 1937 such settlement was consummated. Under its terms the defendant directors paid the petitioner and the other plaintiff stockholders the sum of $50,000 in full settlement and discharge of the claims and cause of action of the petitioner and her coplaintiffs. In connection with the settlement the petitioner and the other stockholders released all their rights and claims arising out of the acts committed by the defendants as alleged in the complaint. The suit was dismissed on May 14, 1937.

At the time of the settlement the assets of Hartman (Virginia) consisted of $1,909.94 in cash and the Graham suit and its liabilities amounted to $630,574.57, representing the claims allowed by the court.

The petitioner's proportionate share of the $50,000, after payment of counsel fees and expenses, amounted to $12,500. [fol. 87] In her income tax return for 1937 she claimed a deduction from gross income in the amount of $19,940 as a loss due to the worthlessness of her Hartman (Virginia) stock. The respondent denied the deduction and included in her gross income for that year the sum of $12,500 which she received pursuant to the settlement.

The petitioner claimed a deduction from gross income in her 1934 income tax return in the amount of $32,302 as a loss due to the worthlessness of the 1,100 shares of Class

A Hartman (Virginia) stock. The deduction was denied by the Commissioner on the ground that the stock did not become worthless in the year 1934.

The petitioner at no time received any deduction from her gross income in the determination of her income tax liability by reason of her investment in Hartman (Virginia) stock.

We further find that the petitioner's stock in Hartman (Virginia) did not become worthless in 1937.

Opinion

Van Fossan, *Judge:*

The first issue presents the question of when the petitioner's stock in Hartman (Virginia) became worthless. The petitioner contends that the identifiable event which determined the fact and the extent of her loss due to the worthlessness of the stock was the negotiated settlement of the Graham suit in 1937, and argues that before that occurrence she had no means of ascertaining what, if any, her loss would be.

We are of the opinion that petitioner can not be sustained on this issue. Not only is the evidence insufficient to establish that the stock had any value at the beginning of 1937 and became worthless during that year, it clearly shows that the stock was worthless prior to that year. The financial history of the company, including the receiver-[fol. 88] ship in 1932, the report of August 10, 1934, showing the only assets to be some $39,000 in cash and the Graham suit, against outstanding claims of some $707,000 and the second report in 1935 showing less cash with the same outstanding claims demonstrate the hopeless condition of the corporation. We have no evidence on which to base a conclusion that the Graham suit was an asset of any substantial value. We know nothing of the merits of the suit, the probability of recovery, the assurance of the collection of a judgment, or other essential factors. The stipulated fact that the defendants were men of financial responsibility is not sufficient to establish the collectibility of a recovery equal to the outstanding claims. These claims aggregated more than half a million dollars and had to be satisfied before there would be anything for the stockholders. In our opinion, all value had gone from the

stock prior to 1937. We sustain respondent in his disallowance of the claimed loss.

The second issue presents the question whether the payment of $12,500 was income to petitioner. According to the stipulated facts the complaining stockholders were paid $50,000 "in full settlement and discharge of the claims and cause of action of petitioner and the plaintiff stockholders as set forth in the complaint." How the sum was arrived at we do not know. Apparently it was a negotiated lump-sum settlement. Whether the defendants merely "bought their peace" we can only conjecture. It is noted that the payment did not go through the corporate treasury although the prayer of the complaint specifically asked that the defendants "be adjudged and decreed to pay into the treasury." The reason is obvious. If a judgment had been entered and payment had been made into the corporate treasury, the proceeds would have been applied first to the creditor's claims and nothing would have remained for the stockholders.

[fol. 89] On the record we are unable categorically to catalog and characterize the payment. We can not determine whether it was replacement of capital restoration of lost profits, compensation for damages suffered, nuisance value, or some other type of payment. In this situation we have no alternative to holding that petitioner, on whom rested the burden of proof, has not proved that the item was not income.

Decision will be entered under Rule 50.

Enter: ENTERED OCT 23 1943 (Seal)

THE TAX COURT OF THE UNITED STATES

WASHINGTON

[Same Title]

DECISION

Pursuant to the Court's Memorandum Findings of Fact and Opinion, entered October 23, 1943, the parties herein having filed an agreed recomputation of tax on December 15, 1943, it is

ORDERED AND DECIDED: That there are deficiencies in income tax for the calendar years 1936 and 1937 in the respective amounts of $109.95 and $5,957.86.

Enter:

(Signed) Ernest H. Van Fossan, Judge. (Seal.)

[fol. 90] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 111621

[Title omitted]

PETITION OF LILLIAN BOEHM FOR REVIEW

To the Honorable the Judges of the Circuit Court of Appeals of the United States, for the Second Circuit:

Now comes Lillian Boehm, by her attorney, Louis Boehm, and respectfully shows:

I.

JURISDICTION

Petitioner's residence and place of business, 470 West End Avenue, New York City. Income tax return for calendar year 1937 was filed with the Collector of Internal Revenue, for the Second District of New York, and within the jurisdiction of this Court; that the Court in which review is sought is in the United States Circuit Court of Appeals for the Second Circuit.

[fol. 91] II

PRIOR PROCEEDINGS

Commissioner of Internal Revenue determined deficiency in the sum of $7,663.09 on April 21, 1942. Taxpayer filed appeal on June 22, 1942 with the Board of Tax Appeals. The case was tried before the Tax Court of the United States on June 14, 1943, and on October 23, 1943 the Tax Court of the United States promulgated its findings of fact and opinion, and on December 18, 1943 entered its decision wherein it was ordered and decided that there was a deficiency in the sum of $6,067.81.

III

Nature of Controversy

The nature of the controversy is two-fold. First, is the question whether petitioner's stock in The Hartman Corporation became worthless prior to 1937. Second is the question whether the sum of $12,500 received by petitioner in 1937 in connection with the settlement of an action brought by petitioner and other stockholders of The Hartman Corporation against the directors of The Hartman Corporation is income to petitioner, or is a reduction of the cost of her stock.

IV

Assignments of Error

The taxpayer avers that in the record and proceedings before the Tax Court of the United States, and in the opinion and final decision rendered and entered by the Tax Court of the United States, manifest error occurred and intervened to the prejudice of the taxpayer who is ag- [fol. 92] grieved thereby, and who now assigns errors hereinbelow set forth and each of them, which she avers occurred in said record, proceeding and final decision so rendered and entered by the United States Tax Court, and hereby petitions that the said decision of the Tax Court be reviewed by the United States Circuit Court of Appeals, that a transcript of the record be prepared in accordance with the law and with the rules of said Court and transmitted to the Clerk of said Court for filing and that appropriate action be taken to the end that the said errors hereinbelow set forth hereinafter complained of may be reviewed and corrected by said Court, and the taxpayer assigns as error the following acts and omissions of the Tax Court of the United States:

1. Failure to allow a deduction of $19,940 as a loss on stock of The Hartman Corporation in the year 1937.

2. Failure to determine that petitioner ascertained that in the year 1937 her stock in The Hartman Corporation became worthless.

3. Failure to find that prior to 1937 petitioner had a reasonable expectation that her stock in The Hartman Corporation was not worthless.

4. Finding that petitioner's stock in the Hartman Corporation became worthless prior to 1937.

5. Failing to find that the identifiable event which determined the fact and extent of petitioner's loss due to the worthlessness of the stock of The Hartman Corporation was the settlement of the Graham suit in 1937.

6. Finding that the evidence was insufficient to establish the petitioner's stock of The Hartman Corporation had any [fol. 93] value at the beginning of the year 1937, and became worthless during that year.

7. Failure to find the evidence sufficient to establish that petitioner's stock of The Hartman Corporation had some value at the beginning of the year 1937, and became worthless during that year.

8. Finding that the condition of The Hartman Corporation was hopeless prior to the year 1937.

9. Failure to find that the condition of The Hartman Corporation was not hopeless prior to the year 1937.

10. Finding that there was no evidence on which to base the conclusion that the Graham suit was an asset of any substantial value.

11. Failure to find that there was evidence on which to base a conclusion that the Graham suit was an asset of substantial value.

12. Finding that there was no evidence as to the merits of the Graham suit, the probability of recovery, the assurance of the collection of a judgment, and other essential factors.

13. Failure to find that there was evidence as to the merits of the Graham suit, the probability of recovery, the assurance of the collection of a judgment, and other essential factors.

14. Finding that all value had gone from the stock of The Hartman Corporation prior to 1937.

15. Failure to find that all value had not gone from the stock of The Hartman Corporation prior to the year 1937.

[fol. 94] 16. Finding that the payment of $12,500 in the year 1937 was income to petitioner.

17. Failure to find that the payment of $12,500 to petitioner in the year 1937 was not income to petitioner.

18. Finding that there was no evidence as to the manner in which the amount of the settlement was arrived at.

19. Failure to find that the amount of the settlement was arrived at in settlement of petitioner's causes of action as a stockholder.

20. Finding that if judgment had been entered in the Graham suit the proceeds have been applied first to creditors' claims, and nothing would have remained for the stockholders.

21. Failure to find that if a judgment had been entered in the Graham suit and payment had been made into the corporate treasury, something would have remained for the stockholders after the payment of creditors' claims.

22. Finding that the evidence was insufficient to determine whether the payment to petitioner was replacement of capital, restoration of lost profits, compensation for damages suffered, nuisance value, or some other type of payment.

23. Finding that the payment to the plaintiff stockholders in the Graham suit did not go through the corporate treasury because if a judgment had been entered in the Graham suit and payment had been made into the corporate treasury, the proceeds would have been applied first to the creditors' claims, and nothing would have remained for the stockholders.

[fol. 95] 24. Failure to find that the amount of $50,000 paid to the plaintiff stockholders in the Graham suit was not paid in settlement of the cause of action of the corporation, but was to compensate for, and was paid in settlement of the individual loss and damage suffered by the plaintiffs in the Graham suit, as stockholders of The Hartman Corporation, owing to the acts of the defendants set forth in the complaint, and that such settlement did not affect the cause of action of the Corporation, and that that was the reason payment was not made into the corporate treasury.

25. Failure to find that under the law the plaintiff stockholders in the Graham suit had an absolute right to make such settlement.

26. Failure to find that if the Graham suit had proceeded to trial and a judgment had been entered therein on the merits, that there was a reasonable prospect of such judgment being for a sum far in excess of the outstanding claims against The Hartman Corporation, and that there was a reasonable prospect that a substantial amount might have been left over for the stockholders.

27. Conjecturing that the defendants in the Graham suit in making the settlement merely bought their peace, and in finding that it could not be determined whether the sum of $12,500 paid to petitioner as her share of the settlement of the Graham suit was replacement of capital, restoration of lost profits, compensation for damages suffered, nuisance value, or some other type of payment.

28. Failure to find that the amount of $12,500 paid to petitioner was paid as compensation for damages sustained by her as a stockholder of The Hartman Corporation.

29. Finding that petitioner had failed to sustain the burden of proof that the payment to her was not income.

[fol. 96] 30. Failure to find the evidence sufficient to prove that the payment to petitioner was not income.

31. Failure to find that the cause of action against the directors of The Hartman Corporation was a valuable asset owned by the corporation, and that until said cause of action was disposed of by judgment or settlement it could not be determined whether petitioner's stock was worthless.

32. Failure to find that petitioner properly applied the amount received on the settlement from the cost of her stock, deducted the balance of $19,440 from her income as a loss on a worthless security.

33. Denial of petitioner's motion to reopen the record for the presentation and submission of further proof as to the following matters concerning which the Tax Court stated that the petition set forth insufficient facts to enable it to make a determination: (1) that the Graham suit was an asset of substantial value; (2) as to the merits of the Graham suit; (3) as to the probability of recovery; (4) as to the assurance of the collection of a judgment; (5) as to the financial worth of the defendants and their ability to

pay a recovery in excess of the outstanding claims against The Hartman Corporation; and (6) that the sum of $12,500 paid to petitioner was paid as compensation for damages.

Dated, New York, February 4th, 1944.

Lillian Boehm, Petitioner.

(Verified by Lillian Boehm on February 4, 1944.)

[fol. 97] AFFIDAVIT OF SERVICE—Filed February 24, 1944

STATE OF NEW YORK,
County of New York, ss:

Augusta M. Weissman, being duly sworn, deposes and says, that she is over the age of 18 years.

That on February 23, 1944, she served the Petition for Review and notice of filing thereof on the Respondent in the above matter, by mailing a copy thereof to J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Washington, D. C.

(S.) Augusta M. Weissman.

Sworn to before me this 23 day of February, 1944.
(S.) Ruth G. Berman, Notary Public, New York County. N. Y. Co. Clk's No. 387, Reg. No. 451-B5. Commission Expires March 30, 1945.

[fol. 98] NOTICE OF FILING OF PETITION FOR REVIEW

To J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Washington, D. C.:

You are hereby notified that the petitioner did on February 16th, 1944, file with the Clerk of the Tax Court of the United States at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit of the decision of the Tax Court of the United States heretofore rendered in the above-entitled cause. A copy of the petition for review and assignments of error as filed is hereto attached and served upon you.

Dated, New York, February 24th, 1944.

(S.) Louis Boehm.

Personal service of the above and foregoing Notice, together with a copy of the Petition for Review and Assignments of Error mentioned therein is hereby acknowledged this — day of February, 1944.

———

[fol. 99] THE TAX COURT OF THE UNITED STATES

[Same title]

PRAECIPE FOR RECORD

To the Clerk of the Tax Court of the United States:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, with reference to petition for review heretofore filed by the petitioner in the above cause, a transcript of record in the above cause, prepared and transmitted as required by law and by the rules of said Court, and to include in said transcript of record the following documents or certified copies thereof, to wit:

1. Docket entries of all proceedings before the Tax Court.

2. Pleadings before the Tax Court of the United States as follows:

(a) Petition filed June 22, 1942;

(b) Answer filed August 10, 1942;

(c) Motion for re-hearing to open the record for the presentation and submission of further evidence filed November 5, 1943.

3. Stipulation of facts and exhibits.

4. Findings of facts and opinion of the Tax Court of the United States.

5. Decision of the Tax Court.

[fol. 100] 6. Petition for review filed by petitioner in the above cause.

7. This Praecipe.

Louis Boehm, Attorney for Petitioner.

The within Praecipe approved this — day of ——, 1944.

—— ——, Attorney for Respondent.

[fol. 101] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 102] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1944

No. 22

(Argued December 7, 1944. Decided January 11, 1945)

LILLIAN BOEHM, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Before Swan, Augustus N. Hand and Chase, Circuit Judges

Petition to Review a Decision of the United States Tax Court

The taxpayer seeks review of an order of the Tax Court determining a deficiency in income tax for the year 1937. Reversed and remanded.

Louis Boehm, attorney for petitioner. Bernard D. Fischman, of counsel.

Samuel O. Clark, Jr., Assistant Attorney General, Sewall Key, A. F. Prescott, and S. Dee Hanson, Special Assistants to the Attorney General, for respondent.

[fol. 103] SWAN, Circuit Judge:

In 1929 the taxpayer bought stock of The Hartman Corporation at a cost of $32,440. She claimed that this stock became worthless in the year 1937; and in the same year she received $12,500 as her share of a settlement of a stockholders' derivative action brought by her and other stockholders against directors and officers of the corporation. Accordingly, in her income tax return for 1937 she claimed a deduction of $19,940 as a loss sustained on her stock. The Commissioner denied the claimed deduction on the ground that the loss was not sustained in that year, and he included the $12,500 settlement recovery as taxable income. The Tax Court sustained both rulings. This appeal challenges their correctness.

The precise year in which a loss for worthless stock may be successfully claimed as a deduction in computing net income is always a troublesome question for a taxpayer. "Losses sustained during the taxable year and not com-

pensated for by insurance or otherwise" are allowable deductions, section 23(e) of the Revenue Act of 1936; but whether the loss on stock in a corporation which has become insolvent was "sustained" in the taxable year or some other year presents a question of fact frequently not easy of determination and upon which the taxpayer must carry the burden of proof. *Keeney* v. *Commissioner,* 116 F. 2d 401 (C. C. A. 2). The Tax Court found specifically that the petitioner's stock did not become worthless in 1937, and in its opinion stated that the evidence clearly shows that it became worthless prior to that year. This finding of fact can be reversed only if unsupported by substantial evidence. *Dobson* v. *Commissioner,* 320 U. S. 489; *Mahler* v. *Commissioner,* 119 F. 2d 869 (C. C. A. 2), cert. den. 314 U. S. 660. We cannot say there is no substantial support for it. In June 1932 equity receivers were appointed for the corporation; their report of August 10, 1934 showed outstanding [fol. 104] claims of $707,430.67 and assets of only some $39,000 in cash and the derivative stockholders' action above mentioned, which will be referred to hereafter as the *Graham* suit. In July 1935 the receivers filed a second report; it showed the cash to have been reduced to about $27,000, mentioned again the *Graham* suit and the same amount of outstanding claims, and recommended that claims totaling $630,574.57 be allowed and a dividend of 4 per cent. be paid thereon. The court adopted the report and its recommendations, and discharged one of the two receivers. The remaining receiver filed a final report and was discharged in September 1937. This report listed as the sole remaining asset cash in the amount of $1909.94. The *Graham* suit had been dismissed on stipulation in May 1937. That suit was instituted in December 1932 by the taxpayer and eight other plaintiffs on behalf of themselves and all other stockholders who might intervene. It charged the defendant directors and officers with waste, mismanagement and violation of their duties as fiduciaries, and prayed that they be required to account to the corporation and pay to it the loss and damage it sustained by reason of their wrongful acts. During the years 1933 to 1936, inclusive, extensive examinations were had of certain of the defendants, and the plaintiffs expended some $2,800, exclusive of attorney's fees, in connection with taking such testimony. Shortly before the case was to be reached for trial, the suit was settled. On February 20, 1937 the sum of $50,000 was paid by the de-

fendant directors in full settlement and discharge of the plaintiffs' claims. The taxpayer's share of the settlement, after payment of counsel fees and expenses, amounted to $12,500.

It is apparent from the receivers' reports of 1934 and 1935 that the corporation was hopelessly insolvent and its stock worthless, unless a recovery should be made in the *Graham* suit large enough to pay off creditors, whose allowed claims totaled some $630,000. The Tax Court thought [fol. 105] that not enough was shown to justify an inference that these claims would be paid. On this subject Judge Van Fossan's opinion says:

> "* * * We have no evidence on which to base a conclusion that the Graham suit was an asset of any substantial value. We know nothing of the merits of the suit, the probability of recovery, the assurance of the collection of a judgment, or other essential factors. The stipulated fact that the defendants were men of financial responsibility is not sufficient to establish the collectibility of a recovery equal to the outstanding claims. These claims aggregated more than half a million dollars and had to be satisfied before there would be anything for the stockholders. In our opinion, all value had gone from the stock prior to 1937."

Despite the huge damages, running into millions, which the complaint alleged the corporation had suffered from the directors' mismanagement, the Tax Court's inference of fact that the litigation would not produce enough to restore any value to the stock cannot be said to be so unreasonable as to justify setting it aside. Indeed, it finds support in the conduct of the taxpayer herself, whose income tax return for the year 1934 claimed a deduction (disallowed by the Commissioner) of $32,302 as a loss due to the worthlessness of her stock, thus indicating that she herself then inferred, despite the pending suit, that the stock became worthless in that year. See *Forbes* v. *Commissioner*, 62 F. 2d 571, 574 (C. C. A. 4). The fact that other stockholders did not intervene and that the equity receivers were not interested to prosecute the corporation's cause of action against its directors is also not without significance in appraising the probable value of this asset.

The petitioner argues that the definitive event which determined whether there would be a loss and, if there was, the [fol. 106] amount of it was the settlement of the *Graham* suit in 1937. Particular reliance is placed in *Morton* v. *Commissioner*, 104 F. 2d 534 (C. C. A. 4) for the proposition that the final settlement of litigation is "the determinative event which fixed the time of the loss." There a mortgage foreclosure sale of the taxpayer's property was had in 1932 and litigation involving the validity of the sale was settled in 1934. The taxpayer claimed his loss was sustained in the latter year, not in the year when the property was sold on foreclosure, and the court so held because the validity of the sale was not determined until the litigation ended. This principle is not applicable to the case at bar. Here there were identifiable events—receivership and the receivers' reports—which showed the stock to be utterly worthless, unless a stockholders' derivative action of unproven value should restore some 600,000 to the corporate treasury. The probability of such a result was too speculative to permit stockholders to postpone the taking of their losses until termination of the litigation. See *Young* v. *Commissioner*, 123 F. 2d 597, 599 (C. C. A. 2). Instead of being governed by *Morton* v. *Commissioner*, *supra*, the situation at bar is more analogous to that involved in *Niagara Share Corp.* v. *Commissioner*, 82 F. 2d 208 (C. C. A. 4), which the court cited and distinguished in the *Morton* opinion. In the *Niagara* case the taxpayer sustained a loss on the sale of securities in 1930, but had a claim against three individuals who had given a guaranty against the loss but denied liability on their guaranty. The court held that the loss should be taken in the year when suffered and the recovery, if any, accounted for in the year when litigation on the guaranty ended. In accord is our own decision in *Commissioner* v. *John Thatcher & Son*, 76 F. 2d 900. The case of *Sabath* v. *Commissioner*, 100 F. 2d 569 (C. C. A. 7), also relied upon by the petitioner, we regard as distinguishable on its facts. [fol. 107] The petitioner further argues that the question to be determined is not whether the stock actually became worthless before 1937 but whether she honestly believed that it had some value until settlement of the litigation. This court has approved the objective rather than the subjective test in determining the worthlessness of stock. *Squier* v. *Commissioner*, 68 F. 2d 25, 27; *Olds & Whipple* v. *Commissioner*, 75 F. 2d 272, 275; *Mahler* v. *Commissioner*,

119 F. 2d 869, 872, cert. den. 314 U. S. 660. In the *Mahler* opinion we said that a taxpayer must claim his deduction "in the year in which events are such as to furnish convincing evidence that the stock has in fact become worthless in that year." In so far as *Smith* v. *Helvering*, 141 F. 2d 529 (C. A. D. C.) adopts the subjective test we must respectfully disagree with it.

For the foregoing reasons we affirm the ruling that the loss was not sustained in 1937. But we are constrained to disagree with the ruling that the settlement payment of $12,500 should be included as taxable income to the petitioner. The Tax Court's opinion states:

> "On the record we are unable categorically to catalog and characterize the payment. We can not determine whether it was replacement of capital, restoration of lost profits, compensation for damages suffered, nuisance value, or some other type of payment. In this situation we have no alternative to holding that petitioner, on whom rested the burden of proof, has not proved that the item was not income."

In holding that the taxpayer had not proved that the payment was not income we think the court was in error. The complaint in the *Graham* suit charged that the defendant directors had acted illegally and in a manner destructive of the corporation and the rights of its stockholders, and to [fol. 108] its and their great damage. Clearly whatever the petitioner received in settlement was paid her as a stockholder and represented damages for destruction of the value of her stock caused by the allegedly illegal acts of the defendants. Since her stock had become worthless before 1937 and since she had never received any deduction from her gross income in any taxable year by reason of the loss of her investment in the stock, the sum she recovered in the settlement must be regarded as a capital item in reduction of her loss rather than as income. In *Estate of James N. Collins*, 46 B. T. A. 765, the Board of Tax Appeals under similar circumstances applied the so-called tax benefit principle and treated the compromise of litigation as resulting in capital gain rather than taxable income to the taxpayer, and its action was upheld in *Dobson* v. *Commissioner*, 320 U. S. 489. Uniformity of tax administration requires application of the same principle in the case at bar. Accordingly the decision is reversed and the cause remanded.

[fol. 107] [File endorsement omitted.]

[fol. 108] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

PETITION FOR REHEARING—Filed February 5, 1945

To the Honorable Judges of the Circuit Court of Appeals of the United States, for the Second Circuit:

Now comes Lillian Boehm, by her attorney Louis Boehm and respectfully shows:*

I

The within appeal was argued before this Court on December 7, 1944, and decided on January 11, 1945. The Judges who concurred in the judgment of this Court were Circuit Judges Swan, Augustus N. Hand and Chase. Annexed hereto as Exhibit "A" is a copy of the opinion of this Court.

II

The within petition for rehearing is filed pursuant to Rule 27 of the Rules of the United States Circuit Court [fol. 109] of Appeals, for the Second Circuit. The time for filing the within petition for rehearing was extended by Circuit Judge Swan on January 25, 1945, to February 5, 1945.

III

Petitioner requests a rehearing of the within appeal insofar as the Court affirmed the decision of the Tax Court that petitioner's stock in the Hartman Corporation did not became worthless in the year 1937. Petitioner bases this application for a rehearing on four grounds:

1. This Court in its opinion stated that "the finding of fact" of the Tax Court as to the year in which petitioner's stock became worthless "can be reversed only if unsupported by substantial evidence." Petitioner respectfully

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* Unless otherwise indicated, emphasis is ours.

submits that where, as in the instant case, the entire record consists of an agreed statement of facts that the conclusion drawn by the Tax Court from the conceded facts constitutes a conclusion of law and not a determination of fact. Hence, this Court is respectfully requested to review the determination of the Tax Court as a determination of law.

2. This Court in its opinion stated that "the conduct of the taxpayer in claiming a deduction in her 1934 income tax return indicated that "she herself then inferred, despite the pending suit, that the stock became worthless" in 1934. Petitioner respectfully submits, for the reasons hereinafter set forth, that her attempt to deduct the loss in 1934 does not indicate that she believed her stock to be worthless in that year, and that furthermore, applying the "objective test" laid down by this Court in determining the value of the Graham suit, her opinion as to its value in any event would be immaterial.

3. This Court in its opinion stated that "the fact that other stockholders did not intervene" in the Graham suit [fol. 110] (which had been brought by petitioner and six other stockholders of the Hartman Corporation) was "not without significance in appraising the probable value" of the Graham suit. While it is true that other stockholders did not intervene in the Graham suit, nevertheless, it has no significance because (a) other stockholders of the Hartman Corporation petitioned the N. Y. Supreme Court, pursuant to Section 193, subdivision 2 of the Civil Practice Act, for permission to intervene in the Graham suit and said petition was denied; and (b) another derivative stockholders' action was brought in the New York Supreme Court by other stockholders, which action was likewise settled. Hence, in appraising the value of the Graham suit, the significant fact is that other stockholders did actually seek to intervene therein and that another group of stockholders commenced an independent action, which was likewise settled.

4. This Court in its opinion stated that the fact that "the equity receivers were not interested to prosecute the Corporation's cause of action against its directors is also not without significance in appraising the probable value of this asset (Graham suit)." While it is true that the equity receivers were not interested in prosecuting the Corporation's cause of action against its di-

rectors, nevertheless, that lack of interest was not due to lack of merit in the cause of action but to an entirely different circumstance. The equity receivers were Martin L. Straus and Elias Mayer (153). Martin L. Straus was the President and a director of Hartman and a defendant in the Graham suit. He could not, therefore, be expected to prosecute the Corporation's cause of action against himself. Elias Mayer, the equity co-receiver, was his lawyer, and likewise could not be expected to prosecute a cause of action against his client. In fact, Elias Mayer was a defendant in the other stockholders' action.

Each of these four grounds will be separately discussed.

[fol. 111] Point I

An appeal from a decision based entirely on an agreed statement of facts raises solely questions of law.

No evidence was presented before the Tax Court. The case was submitted on an agreed statement of facts (fols. 79 to 96 of the record). When a case is presented upon an agreed statement of facts there are no findings of fact by the Trial Court. We respectfully submit that the conclusion to be drawn from the agreed facts is a conclusion of law and not a finding of fact. With all due deference, it seems to us quite unrealistic to treat the opinion of a single judge of the Tax Court upon conceded facts as a determination of fact which this Court may not review. Surely, the single judge of the Tax Court has no method of determining the merits or value of a lawsuit superior to that of this honorable Court. We submit that when the facts are agreed upon there remains only the application of the law to the conceded facts, and that the resulting determination is a determination of law and not of fact.

In *Matter of Trowbridge*, 266 N. Y. 283, an analogous situation was presented. In the *Trowbridge* case, James A. Trowbridge died at Noroton, Connecticut on May 30, 1931. His will was probated in New York County and the question was as to whether the decedent had died a resident of New York or of Connecticut. The State of Connecticut submitted to the jurisdiction of the Surrogate of New York County and an agreed statement of fact was submitted to that Court.

The conceded facts were as follows: Mr. Trowbridge was born and educated in Connecticut but came to New

York in early manhood to engage in business, and resided there until 1904. After retirement from business, he purchased a residence in Connecticut which he made his domicile until 1921, when the house was destroyed by fire. He rebuilt the house and lived therein with his wife and son [fol. 112] until his death in 1931. After completion of the new building decedent's house in New York was unused and boarded up; telephone service was discontinued and furnishings and silver removed to the new home. After the year 1921 the decedent, however, continually characterized himself in tax returns and other writings as a resident of New York. He registered and voted in that city. His name was transferred to the resident tax roll for the Borough of Manhattan, and in affidavits and in his will he declared himself as a resident of New York. The Surrogate decided that the decedent had died a resident of New York. The Appellate Division unanimously affirmed this decision. On further appeal, the Court of Appeals reversed the decision and held, *as matter of law*, that decedent had been a resident of Connecticut. The conceded facts in the *Trowbridge* case were undoubtedly susceptible of two inferences. The Surrogate and the Appellate Division of the New York Supreme Court both drew the inference that Mr. Trowbridge had died a resident of New York. However, because none of the facts were disputed, the Court of Appeals went into the facts and, as *matter of law*, decided that he was a resident of Connecticut. At pages 288 and 289 the Court stated:

> "Mr. Trowbridge, however, had but one domicile when he died. What must be here decided is whether all the facts tending to show that his domicile was then in Connecticut conclusively overbalance all the facts tending to show that he was at that time domiciled in this State. In its nature such an analysis of the evidence is a comparison of one combination of facts with another and the significance of some of the factors involved is *as matter of law* greater than that of others."

And at page 293, the Court said:

> "Here, as we have said, all the primary evidentiary facts are admitted. We think that, upon the findings made below, the only inference admissible in *sound*

reason is that the domicile of Mr. Trowbridge at his death was at Noroton, Connecticut. It may be sug- [fol. 113] gested, of course, that by this disposition of the controversy we have imputed unreasonableness to the courts below because we disagree with them. Such a pleasantry has been dismissed before this. (Thayer, Cases on Evidence (2d ed.), p. 163.)"

The reason for this rule is likewise apparent. The respect and weight given to the trier of the facts who sees and hears the witnesses and passes upon their credibility is necessarily absent when there are no witnesses whose credibility is in issue and no disputed facts to be determined. In other words, there is no issue of fact when the facts are conceded. The conclusion to be drawn from the conceded facts then becomes a conclusion of law.

The rule is particularly applicable to the instant case, where the Circuit Court of Appeals, composed of three distinguished lawyers, possesses far greater skill in appraising the value of a lawsuit than a single judge of the Tax Court, who may be a layman. The year in which the petitioner's stock became worthless is dependent upon an appraisal of the Graham suit. There is no special skill or knowledge in a judge of the Tax Court which would qualify him to make an expert appraisal of the value of the Graham suit. Certainly, he is in no better position to judge the merits or value of this suit than is this honorable Court itself. As all the facts concerning the Graham suit are set forth in the stipulation of facts and the exhibits annexed thereto, this Court can determine for itself the merit and value of that suit.

We do not question the general rule of the *Dobson* case (*Dobson* v. *Commissioner*, 320 U. S. 489), which this Court cited, that findings of fact may be reversed only if unsupported by substantial evidence. We state merely that the rule is inapplicable where the facts are *conceded*. In such case we respectfuly submit that the determination below is not a determination of fact by which this Court is bound, but that this Court should review the case as presenting a [fol. 114] question of law as though submitted to it *de novo* on agreed facts. This was done in the *Trowbridge* case, *supra*, by the New York Court of Appeals (which may not review determinations of fact). Despite the fact that an opposite conclusion might be and actually was drawn

from the conceded facts by the courts below, it drew its own conclusion and reversed the lower courts *as matter of law.*

Point II

The attempted deduction by petitioner of her loss in the year 1934 does not support the inference that she then believed her stock to be worthless.

Petitioner attempted to deduct her loss on the stock of the Hartman Corporation in the year 1934. From this fact this Court inferred that petitioner then thought her stock to be worthless. However, this Court has recognized the dilemma in which taxpayers often find themselves and in *Young* v. *Commissioner*, 123 F. (2d) 597, 600, Judge A. N. Hand said:

> "In cases like this the taxpayer is at times in a very difficult position in determining in what year to claim a loss. The only safe practice, we think, is to claim a loss for the earliest year when it may possibly be allowed and to renew the claim in subsequent years if there is any reasonable chance of its being applicable to the income for those years."

Petitioner did no more than to adopt "the only safe practice" as sugested by this Court.

Furthermore, the inference (to which this Court referred at p. 688) that the taxpayer herself thought that the stock became worthless in 1934, because she attempted to take a deduction in that year, is contradicted by the conceded fact that she continued thereafter vigorously to [fol. 115] prosecute her lawsuit and to expend substantial sums of money thereon. But even assuming, for the sake of argument, that the taxpayer in 1934 feared that her stock had become worthless despite the lawsuit, this Court, in this very case, has held that the *objective* and not the subjective test of worthlessnes of an asset should be adopted, and that "insofar as *Smith* v. *Helvering*, 141 F. 2d 529 adopts the subjective test, we must respectfully disagree with it" (p. 690). Judged, therefore, by the "objective test," namely, what the *intrinsic merits* of the lawsuit were and not what the taxpayer thought about them, the fact that the taxpayer sought to deduct her loss in 1934 can have no bearing on the objective question of the intrinsic merit and value of the lawsuit.

Judging the lawsuit by the objective standards laid down by this Court, we must take into consideration the facts set forth in the complaint in the Graham case, *which have in no wise been contradicted before the Tax Court*, the amount of the damage which Hartman sustained as a result of the transactions set forth in the complaint, and the fact that if the case had gone to trial a judgment might have been obtained far in excess of the claims of creditors and enough to leave a substantial amount for the stockholders.

We respectfully submit that the best objective test of the merit and value of this lawsuit is to be found in the actual outcome of the suit. The settlement that was made with the taxpayer and the other stockholders was not a nominal, or nuisance value, settlement but a substantial settlement which netted to the taxpayer approximately 40% of the cost of her stock, after the payment of counsel fees and expenses. Is it reasonable to infer that the directors would have made such a substantial settlement had there been no merit to the suit? It seems to us that the only *sound* conclusion (which is a conclusion of law) [fol. 116] to be drawn from this fact, viewed objectively, is that the lawsuit was an asset of substantial value and that the worthlessness of taxpayer's investment in Hartman stock was not, and could not be, determined until the lawsuit was either tried or settled.

Point III

This honorable Court mistakenly assumed that the failure of other stockholders to intervene in the Graham suit was a significant fact in appraising the value of the Graham suit.

This Court stated that the fact that other stockholders did not intervene in the Graham suit was a fact not without significance. This Court, however, was not aware of the circumstance (a) that other stockholders sought to intervene in the Graham suit but were denied that privilege; and (b) that other stockholders commenced their own action in the New York Supreme Court against the directors of the Hartman Corporation, which action was also settled by the defendants at about the time that the Graham suit was settled. While it is true that these matters do not appear in the record, yet it is also true that the contrary does

not appear. Under the circumstances, therefore, we respectfully submit that this honorable Court was not justified in drawing the inference that other stockholders had not sought to intervene or to recover against the directors of Hartman for their mismanagement.

[fol. 117] Point IV

This honorable Court mistakenly assumed that the fact that the equity receivers were not interested to prosecute the Corporation's cause of action against its directors was a significant fact in appraising the value of the Graham suit.

This Court stated that the fact that the equity receivers were not interested to prosecute the Corporation's cause of action against its directors was likewise "not without significance in appraising the probable value of this asset" (p. 688). We believe that this Court was not aware of the identity and self-interest of the equity receivers in relation to the cause of action against the Hartman directors. The equity receivers were Martin L. Straus and Elias Mayer (Record, fol. 153). Martin L. Straus was the president, a director and the moving spirit of the Hartman Corporation, and a chief defendant in the Graham suit (Record, fols. 215, 221-224). He could not, therefore, be expected to prosecute the Corporation's suit against himself. Elias Mayer was Straus's lawyer and it would be unreasonable to expect that he would prosecute a cause of action against his own client. In fact, Elias Mayer was a defendant in the other stockholder's action instituted in the New York Supreme Court, which was likewise settled.

As was stated by the Court in *Norman* v. *Federal Mining & Smelting Co.*, 180 App. Div. 325, at p. 335:

> "It is not to be assumed that they (the directors) would prosecute in good faith an action based on their own misconduct."

Hence, the fact that the equity receivers were not interested in prosecuting the corporation's cause of action against the directors is readily understandable, and wholly without significance in appraising the value of the Graham suit.

[fol. 118] IV

Wherefore, petitioner respectfully prays that this Court grant a rehearing of her appeal on the issue of the year in

which her stock in The Hartman Corporation became worthless.

Dated, New York, February 1, 1945.

Lillian Boehm, Petitioner.

[fol. 119] *Duly sworn to by Lillian Boehm. Jurat omitted in printing.*

[fol. 120] CERTIFICATE OF COUNSEL

Louis Boehm certifies:

1. That he is the attorney for the petitioner-appellant in in the above entitled appeal.

2. The within motion for a rehearing is well founded in law and is not made for the purpose of delay.

Dated, New York, February 2, 1945.

Louis Boehm.

[fol. 123] UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT

LILLIAN BOEHM, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Before: Swan, Augustus N. Hand and Chase, Circuit Judges

Petition for Rehearing

Louis Boehm, attorney for petitioner.

Per CURIAM:

Petition for rehearing is denied.

T. W. S., A. N. H., H. B. C., C. JJ.

Filed February 7, 1945.

[fol. 124] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of February one thousand nine hundred and forty-five.

Present Hon. Thomas W. Swan, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

LILLIAN BOEHM, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

A petition for a rehearing having been filed herein by counsel for the petitioner,

Upon consideration thereof, it is ordered that said petition be and hereby is denied.

Alexander M. Bell, Clerk.

[fol. 125] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Lillian Boehm, v. Commissioner of Internal Revenue. Order. United States Circuit Court of Appeals: Second Circuit. Filed Feb. 7, 1945. Alexander M. Bell, Clerk.

[fol. 126] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of February one thousand nine hundred and forty-five.

Present: Hon. Thomas W. Swan, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

LILLIAN BOEHM, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from The Tax Court of the United States

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel. On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is reversed and cause remanded in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said The Tax Court of the United States in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 127] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Lillian Boehm, v. Commissioner of Internal Revenue. Order for Mandate. United States Circuit Court of Appeals: Second Circuit. Filed Feb. 10, 1945. Alexander M. Bell, Clerk.

[fol. 128] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 122] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 11, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(9466)